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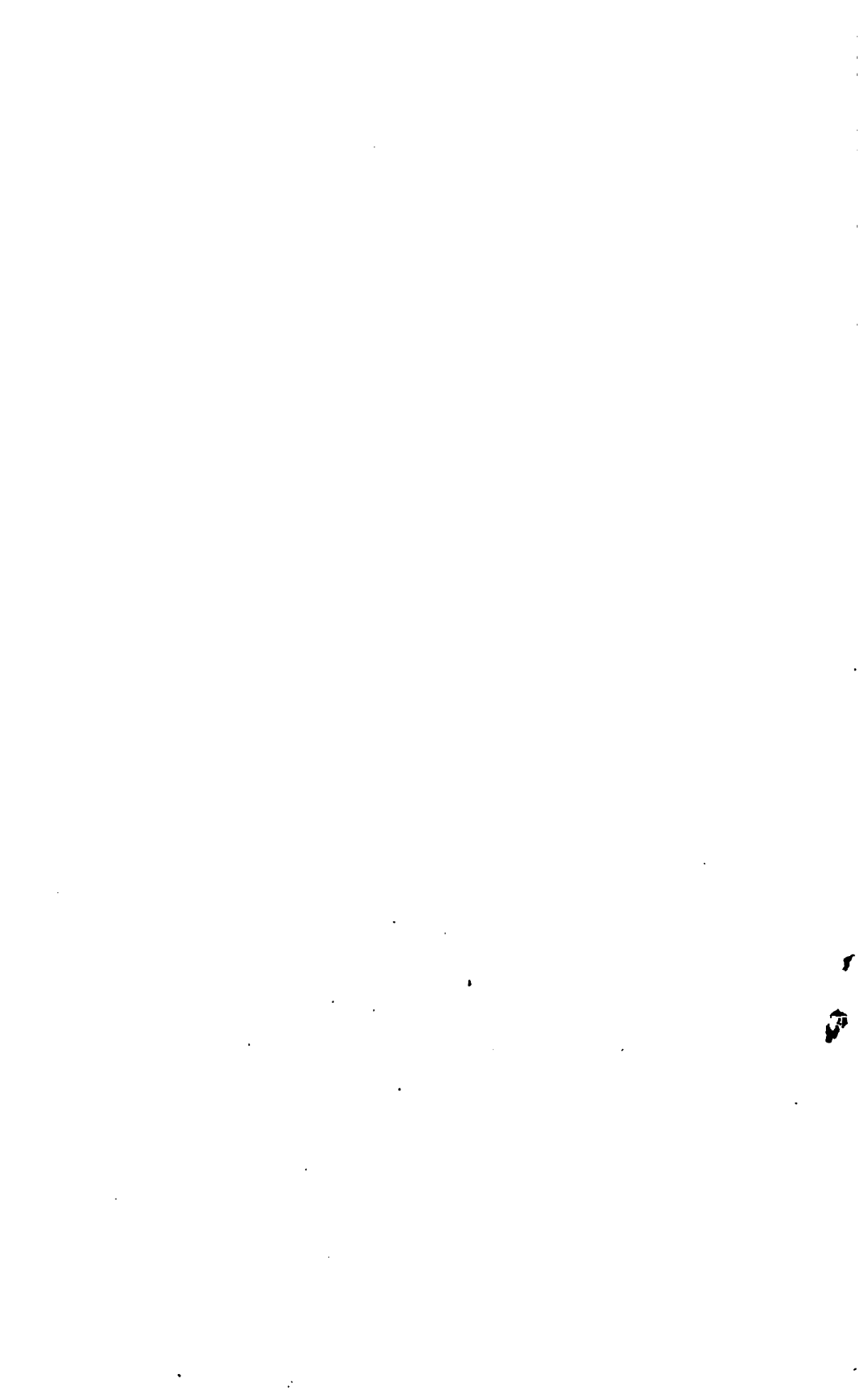
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R E P O R T S
OF
CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY
DURING THE TIME OF
LORD CHANCELLOR COTTENHAM.

BY
J. W. MYLNE, AND R. D. CRAIG, Esqs.
BARRISTERS AT LAW.

VOL. II.
1836-7. — 7 WILL. IV. & 1 VICT.

LONDON:
PRINTED FOR SAUNDERS AND BENNING,
(SUCCESSORS TO J. BUTTERWORTH AND SON,)
43. FLEET-STREET.
1838.

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Lord COTTENHAM, *Lord Chancellor.*

Lord LANGDALE, *Master of the Rolls.*

Sir LANCELOT SHADWELL, *Vice-Chancellor.*

Sir JOHN CAMPBELL, *Attorney-General.*

Sir ROBERT MONSEY ROLFE, *Solicitor-General.*

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MEMORANDA.

In the Vacation after Hilary Term, *Francis Whitmarsh*, Esq., of Grays Inn, *Charles Purton Cooper*, and *Richard Budden Crowder*, Esqs., of Lincoln's Inn, *Biggs Andrews*, Esq., of the Middle Temple, and *Francis Newman Rogers*, *George Chilton*, and *John Evans*, Esqs., of the Inner Temple, were appointed his Majesty's Counsel. *John Jervis*, Esq., of the Middle Temple, at the same time received a patent of precedence.

In the course of the same Vacation, *Thomas Coltman*, Esq., of the Inner Temple, one of his Majesty's Counsel, was, on the resignation of Sir *Stephen Gaselee*, appointed one of the Judges in the Court of Common Pleas; and, some time afterwards, he received the honour of knighthood.

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OF

CASES

ARGUED AND DETERMINED

1836.

IN THE

HIGH COURT OF CHANCERY.

CRAWSHAY v. THORNTON.

*See this case in the
Court below, 7. Term. 391.*

1856.

April 23. 25.

27.

1837.

Jan. 15.

THIS was a bill of interpleader. The Plaintiffs were the persons who, for some years previously to the month of August 1834, constituted, together with *William Crawshay*, since deceased, the firm of *Richard and William Crawshay and Co.*, but who now constituted the firm of *Richard, William, and George Crawshay and*

A. deposited certain iron with B. and Co., who were wharfingers, and afterwards directed them to deliver it

to C. C. applied to B. and Co. to know the particulars of the iron held by them on his account; and B. and Co. then wrote a letter to C., saying, that in compliance with his request, they annexed a note of the landing weights of the iron transferred into his name by A. and now held by them (B. and Co.) at his (C.'s) disposal. B. and Co. subsequently received notice from D. that the iron belonged to him, and that it had been deposited with A. as an agent for sale, and that he had without authority pledged it to C. B. and Co. then filed a bill of interpleader against C. and D.: Held, on demurrer, (affirming the decision of the court below) that after B. and Co.'s letter to C. they could not maintain a bill of interpleader against him.

Of two Defendants to a bill, one only demurred, and the demurrer having been allowed by the Vice-Chancellor, the Plaintiff appealed. The order for setting down the appeal was served on the other Defendant's solicitor, who afterwards received a letter from the Plaintiff's solicitor, asking him whether he would consent to have the appeal advanced; and that Defendant appeared upon the argument, but was not allowed to be heard: Held, that he was not entitled to the costs of his appearance.

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Co. The Defendants were *Henry Sykes Thornton* and *Pavel Daniloff Daniloff*. The bill stated, that the Plaintiffs had for some years carried on business as iron merchants in *London*, in partnership, and that they had and have a bonded yard for foreign iron, and have also acted as wharfingers; and that in and prior to the year 1831, the persons constituting the firm of *W. and T. Raikes* and Co., of *London*, were in the habit of depositing foreign iron in the Plaintiffs' yard for safe custody. The bill then stated, that, in the year 1832, certain specified parcels of iron were deposited with the Plaintiffs by *W. and T. Raikes* and Co., and that, in the early part of the year 1833, an order in writing was brought to the Plaintiffs, signed by *W. and T. Raikes* and Co., requiring the Plaintiffs to weigh and deliver the iron; that the order did not specify the name of the person to whom the iron was to be delivered, but that a verbal message was left that the same "was for Mr. *Thornton*." The bill then stated, that no application having been made for the delivery of the iron, one of the Plaintiffs wrote, in pencil, in the book of his firm which contained an account of the iron, the name "*Thornton*" against each of the parcels mentioned in the order. The bill further stated, that, in *March* 1834, application was made to the Plaintiffs by *Henry Sykes Thornton*, to know the particulars of the iron which the Plaintiffs held on his account; and that one of the Plaintiffs having thereupon ascertained from *Richard Mee Raikes*, who then carried on the business of the firm of *W. and T. Raikes* and Co., that *H. S. Thornton* was the person in whose favour the order for delivery had been given, wrote in the book of the Plaintiffs' firm, which contained the particulars of the iron, against the entry of each of the parcels, the following words and figures, viz. "8th *March* 1834, transferred to *H. S. Thornton*;" and that the Plaintiffs, at the same time, wrote or caused

caused to be written to *Thornton* a letter in the following words:—

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“*George Yard, 8th March 1834.*”

“Sir, — In compliance with your request, we annex a note of the landing weights of the various parcels of *CCND* iron, transferred into your name by Messrs. *W. and T. Raikes* and Co., and now held by us at your disposal.

“We are, &c.,

“*Richard and W. Crawshay* and Co.

“*H. S. Thornton, Esq.*”

The bill then stated that *R. M. Raikes* became bankrupt in *October 1834*, but that neither he nor his assignees claimed any interest in the matters in question. The bill then stated, that on the 8th of *October 1834*, the Plaintiffs received from Messrs. *Lemmé* and Co., merchants, a letter in the following words:—

“Messrs. *R. and W. Crawshay* and Co.

“*1. Finsbury Circus, 1834.*”

“Gentlemen, — You will please to take notice that the whole of the *CCND* iron, lying at your wharf, is the property of Messrs. *P. Daniloff* and *A. Lubinoff*, of *St. Petersburg*, and that Messrs. *W. and T. Raikes* and Co. were agents to them for the sale thereof, and had no power to pledge the same. Learning, however, that Messrs. *W. and T. Raikes* have pledged certain part of the above iron to Messrs. *Williams, Deacon, Labouchere*, and Co. (a), and that you have the authority of the latter to hold such iron at their disposal, we beg to inform you that their authority is nugatory, and you are hereby required to treat it as a nullity, and not to part

(a) *H. S. Thornton* was a partner in this firm.

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part with the possession of any part of such *CCND* iron, but hold the whole thereof at the disposal of Messrs. *P. Daniloff* and *A. Lubinoff*, for whose house we have the honour to be, &c.

“*John Louis Lemmé* and Co.”

The bill then alleged, that *Pavel Daniloff Daniloff*, being the *P. Daniloff* mentioned in the letter of *Lemmé* and Co., carries on business at *St. Petersburg* under the firm of *P. Daniloff* and *A. Lubinoff*, and claims the said iron, and is now resident out of the jurisdiction of the Court. The bill went on to state that, in the month of *December 1834*, *Thornton* attended at the Plaintiffs' counting-house, and tendered to the Plaintiffs their charges in respect of the iron, and demanded the delivery of it; and that, on the 22d of *January 1835*, *Lemmé*, as the agent on behalf of *Daniloff*, attended at the Plaintiffs' counting-house, and delivered to the Plaintiffs the following notice in writing:—

“To Messrs. *R.* and *W. Crawshay* and Co.

“Gentlemen, — As the agent for and on the behalf of *Pavel Daniloff*, of *St. Petersburg*, in the empire of *Russia*, trading under the style or firm of *P. Daniloff* and *A. Lubinoff*, I hereby demand of you the delivery of the under-mentioned goods, the property of the said *Pavel Daniloff Daniloff*, viz.” [here followed the particulars of the iron] “and I hereby tender you, as such agent of the said *Pavel Daniloff Daniloff*, the sum of 200*l.*, and such other sum or sums of money as may be due or owing to you in respect of the said goods; and in the event of your refusing to deliver the same to me as such agent as aforesaid, I hereby give you notice that I shall forthwith cause an action of trover to be commenced against you for the conversion of the said goods,
 and

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and shall hold you responsible in respect thereof.
Dated this 22d day of *January* 1835.

"Yours, &c.

"*John Louis Lemmé.*"

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The bill stated that *Lemmé*, at the time of the demand, tendered and offered to pay any further amount of charges of the Plaintiffs in respect of the iron, if the same should exceed 200*l.* The bill further stated that on the 1st of *January* 1835, *Thornton* commenced an action of trover against the Plaintiffs, to recover the iron, in which action a declaration was delivered on the 24th of *January* 1835; and that an action of trover against the Plaintiffs for the recovery of the iron was also commenced by *Daniloff*, on the 23d of *January* 1835.

The bill alleged that the warehouse rent, charges, and expenses on the iron due to the Plaintiffs, amount to the sum of 160*l.* 15*s.* 6*d.*, and that the Plaintiffs claim no interest or right in or to the iron, except in respect of their charges, their right to which is admitted by the Defendants; and that in manner aforesaid the iron is claimed by *Thornton* and *Daniloff*. The bill charged that the Plaintiffs do not collude with *Daniloff* and *Thornton* or either of them, but are ready to dispose of the iron as the Court may direct; that *Daniloff* alleges and insists that he claims the iron by a title paramount to the title of *Thornton*, or the persons under whom *Thornton* claims the same.

The prayer of the bill was, that *Thornton* and *Daniloff* might be decreed to interplead together, and that it might be ascertained to which of them the iron belongs and ought to be delivered over; and that whatever

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order the Court might make respecting the iron, proper directions might be given with respect to the lien which the Plaintiffs have upon the same, and as to preserving such lien for the Plaintiffs; and that in the mean time *Thornton* and *Daniloff* might be restrained from prosecuting their actions at law so commenced as aforesaid, and from commencing any other actions or proceedings at law or in equity against the Plaintiffs touching the matters aforesaid.

The bill was accompanied by the usual affidavit negating fraud or collusion, or any other intent than to avoid being molested by the Defendants' proceedings at law.

To this bill the Defendant *Thornton* put in a general demurrer, which was allowed by the Vice-Chancellor on the 11th of *May* 1835. The Plaintiffs now appealed from his Honor's decision.

Mr. *Maule* and Mr. *Richards*, for the bill.

The simple question is, whether *Crawshay* and Co. have by their conduct put themselves in such a condition, as to deprive them of their right to compel the Defendants to interplead. The iron is worth 7000*l*. It still remains *in specie*; and if the Plaintiffs, after notice from *Daniloff* of his claim, were to part with it to any other person, they would be answerable to him for its value. The ground of the demurrer is, that the Plaintiffs have made themselves personally liable to *Thornton* by their letter of the 8th of *March*; and the question will be, whether that letter amounts to a contract. *Thornton*, if the mere assignee of *Raikes* and Co., must stand or fall by the rights of *Raikes* and Co. If a wharfinger receive
 goods

goods from a person who is not entitled to them, the wharfinger may refuse to deliver them up to him, and may set up a property in another individual to justify that refusal; *Ogle v. Atkinson* (a), *Cotter v. The Bank of England*. (b) The facts of the latter case correspond with the facts of the present case. The argument in support of the demurrer before the Vice-Chancellor in the present case was, that a wharfinger or bailee cannot repudiate the title of the person by whom goods have been delivered to him, if he receives the goods, and gives an acknowledgment that he holds them for the person by whom they were delivered to him. There have been cases, however, of stolen notes, in which the persons who had stolen them could not recover them from others to whom they had themselves delivered them, because it appeared that they had been fraudulently procured. It may be admitted, that if a person deposits goods with a bailee, and afterwards sells them, and the bailee acknowledges the title of the purchaser, he cannot subsequently repudiate that which he knows to have taken place between the vendor and the purchaser; and it may also be conceded, that if a person, knowing of disputes with respect to the title to property, chooses to take upon himself to decide in favour of the title of one of the disputing parties, he cannot afterwards repudiate that title; but if he does not know of such disputes, and gives an acknowledgment to a person who afterwards turns out to have no title, the acknowledgment may be repudiated; this appears from Mr. Justice Alderson's observations in *Gosling v. Birnie*. (c) So, an acknowledgment made in mistake may be repudiated by the person who has made it; *Heane v. Rogers*. (d) The cases relied upon

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(a) 5 Taunt. 759.

(b) 3 Moore & Scott, 180.

(c) See 7 Bing. 346.

(d) See 9 B. & C. 586., observations of Bayley J.

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on the other side before the Vice-Chancellor were cases of stoppage *in transitu*; they were *Harman v. Anderson* (a), *Stonard v. Dunkin* (b), *Hawes v. Watson*. (c) The latter case was clearly one in which the Defendants had put it in the power of a third party to incur a liability, which he did incur: and if, in the present case, the situation of *Thornton* had been altered by the acknowledgment, it might make a difference: *The Stratford and Moreton Railway Company v. Stratton*. (d) It is to be observed, that the terms of the letter of the 8th of *March* acknowledge that the iron had been transferred into the name of *Thornton* by *Raikes* and Co. and not by the Plaintiffs. The Plaintiffs did not intend to give *Thornton* a better title than *Raikes* and Co. had before. The Plaintiffs had not admitted the title of *Raikes* and Co. It is the universal practice of the *London Dock Company*, and of all wharfingers, upon any deposit of goods, to give an acknowledgment that the goods are held for the benefit of the depositors. The bill only states that the Plaintiffs being wharfingers, *Raikes* and Co. deposited the iron with them. The letter of the 8th of *March* is not a contract by the Plaintiffs with *Thornton*, to hold the iron for him; if it were, *Thornton* would bring a very different action from that which he has commenced; he would not bring an action for the recovery of the specific goods. The case of *Nicholson v. Knowles* (e) will be cited on the other side: but the present Vice-Chancellor, in *Smith v. Hammond* (g), intimated an opinion that that case was carried too far. *Roberts v. Ogilby* (h) is a very different case from this, because there

(a) 2 *Camp.* 243.(b) *Ibid.* 344.(c) 2 *B. & C.* 541.(d) 2 *B. & Adol.* 518.(e) 5 *Mad.* 47.(g) 6 *Sim.* 10.(h) 9 *Price*, 369.

there the parties were not going against the goods themselves.

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In equity, the rule is clear, that unless the Plaintiffs have been guilty of misconduct or collusion, the Court will assist them. It is to be remembered that the question is not between *Raikes* and *Thornton*, but between *Daniloff* and *Thornton*. The cases of *Langston v. Boylston* (a) and *Stevenson v. Anderson* (b) shew how far courts of equity have gone in allowing interpleader. *Langston v. Boylston* much resembles this case. Whether or not a bailee gives an acknowledgment is immaterial; he still holds as agent for the depositor. A doubt expressed by Sir *John Leach* in *Lowe v. Richardson* (c), as to whether the captain of a vessel can file a bill of interpleader, if the adverse claims are paramount to the bill of lading, was much relied on, in support of this demurrer in the Court below; but it appears by a note in the index to the volume of reports containing that case (d), that in *Morley v. Thompson*, 29th of July 1819, Sir *John Leach* retracted the opinion which he had expressed in *Lowe v. Richardson*. In *Pearson v. Cardon* (e), the ground upon which the Vice-Chancellor allowed the interpleader was, that there was a claim of paramount title, although the holders of the goods in that case had admitted themselves to be agents. Where is the difference between such an admission as that, and the admission contained in the letter of the 8th of March? The decision in *Pearson v. Cardon* has since been affirmed on appeal. (g)

In

(a) 2 Ves. jun. 101.

(b) 2 V. & B. 407.

(c) 3 Mad. 277.

(d) See 3 Mad. 564.

(e) 4 Sim. 218.

(g) 2 Russ. & Mylne, 606.

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In *Cooper v. De Tastet* (a) the Master of the Rolls seems to have thought that there was a distinction between depositing goods in a bonded warehouse, and in a private warehouse, and that interpleader might be allowed in the case of a deposit in the former, when it would not be allowed in the case of a deposit in the latter. If there is anything in that distinction, the Plaintiffs will have the benefit of it, for the bill states that the yard in which the iron was deposited was a bonded yard.

The consequences of supporting the Vice-Chancellor's judgment in the present case will be most serious, because such an acknowledgment as the present is of every day's occurrence. The person claiming goods has never any better title than the person under whom he claims, except in case of sale in market overt. In all the cases of stoppage *in transitu*, which were cited on the other side in the Court below, the party to whom the acknowledgment was given was the party who had the title. Those cases, however, have nothing to do with the present case. The judgment in *Gosling v. Birnie* (b) went entirely on the ground of the acknowledgment having been made with full knowledge of the circumstances. It would seem that the affected object for which the letter of the 8th of *March* was applied for, was to ascertain the exact weights and marks of the iron; the acknowledgment is only this, viz. that so far as *Raikes* had a title, that title is transferred to *Thornton*. If *Cooper v. De Tastet* be an authority against the right of interpleader in this case, it is distinctly overruled by *Pearson v. Cardon* and *Mason v. Hamilton* (c), the latter of which decisions is precisely in point. Suppose goods are stolen and pawned, the acknowledgment given by the pawnbroker

(a) 1 *Tamlyn*, 177.(c) 5 *Sim.* 19.(b) 7 *Bing.* 359.

broker to the person who pawns them, does not divest the property of the owner, and the owner is entitled to insist on having them delivered up to him; the pawn-broker is not estopped, by the acknowledgment, from saying to the person who has pledged them, that they are claimed by a title paramount.

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There is nothing in the Interpleader Act which deprives this Court of the power to direct interpleader in this case. The Vice-Chancellor entered into no detail of the reasons for his judgment, but stated that he had conferred with Mr. Justice *Bosanquet*, to whom an application had been made before-hand for a rule calling upon the Defendants to interplead at law, but who had refused the application. In *Viner's Abridgment*, title *Enterpleader* (N. 9), it is said, "in detinue, if they count of several bailments, the Defendant may say it came to his hands as executor, *absque hoc*, that he had it of their delivery, and then the Plaintiffs shall interplead."

Mr. *Jacob*, Mr. *Wigram*, Mr. *Girdlestone* sen., and Mr. *G. S. Wilson*, in support of the demurrer.

A holder of goods is not entitled to file a bill of interpleader in every case in which double claims for those goods are made upon him. He must be not only a stakeholder, but an indifferent and an innocent stakeholder; he must shew that it has not been by any wrongful or erroneous act of his own, that the embarrassment of the double claims has been produced; he cannot file a bill of interpleader against a person with respect to whom he has put himself in such a position as to preclude him from disputing that person's title. It is the rule, both at law and in equity, that a tenant cannot dispute the title of his landlord, and so likewise an agent or servant who holds personal property be-
longing

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longing to his principal or his master, cannot dispute his principal's or his master's title. If this were not the rule, a person could have no security in the enjoyment of his property, unless he kept it always in his own actual possession. A contrary principle would lead to frightful consequences in mercantile transactions. It is true that, if after the commencement of the relation of tenant or agent, the landlord or principal has done any act which has occasioned embarrassment, and has raised questions subsequently to the commencement of the tenancy or agency, a right of interpleader would arise; and a tenant may shew that a landlord's title has determined since the commencement of the tenancy. The acts of the Plaintiffs in this case have materially increased the difficulty under which they labour. The act of transfer and the letter of the 8th of *March* have conferred a title, or colour of title, upon *Thornton*. No case has been cited for the Plaintiffs in which even the transfer alone was not held to give a title; much less one in which such a letter was not held to give a title. In *Stonard v. Dunkin (a)* it was objected that the property in certain malt had not passed to the Plaintiff for want of re-measuring; but Lord *Ellenborough* said that the Defendant was not entitled to raise that objection, after he had in writing acknowledged the Plaintiff's title. It is upon the faith of the acknowledgment contained in the letter of the 8th of *March*, that *Thornton* has ever since that day employed and hired the Plaintiffs as his warehousemen, and that he has thenceforward become liable to them for the wharfage; they have held the goods ever since as his agents. If it could be shewn that the acknowledgment had been given under fraud or deception of any kind, the case might be altered; but no such charge is made by the bill. The Plaintiffs have
 made

(a) 2 Camp. 344.

made no case to relieve themselves from the effect of the acknowledgment and estoppel. It does not appear upon the bill that the goods are not the property of *Raikes*. The bill merely states, that an action for the recovery of the goods had been brought by *Daniloff*. In the report of the case of *Cotter v. The Bank of England* (a) it does not appear whether the conflicting claim was paramount to *Cotter's*, or whether it arose from acts done by him. No point like the present arose. That case was held to be within the Interpleader Act, because the lien of the holders was upon the goods themselves, and not as against one party or the other, and therefore the holders were perfectly neutral.

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Langston v. Boylston (b) was a case in which the title or colour of title of the adverse party had arisen subsequently to the commencement of the relation of principal and agent between the original parties. So in *Stevenson v. Anderson* (c), the arrestment originated subsequently to the deposit. *Lowe v. Richardson* (d) and *Nickolson v. Knowles* (e) go the whole length of the doctrine, that an agent cannot compel his principal to interplead. *Nickolson v. Knowles* is of later date than the case of *Morley v. Thompson* before cited, which is very imperfectly mentioned in the index to 3 *Mad*. The cases of *Cooper v. De Tastet* (g) and *Pearson v. Cardon* (h) both arose out of similar disputes between *De Tastet* and his partners, *Bize, Bordenave, and Co*. It appears by the Lord Chancellor's judgment upon appeal in the latter case (i) (not yet reported), that he coincided with the doctrine of Sir *John Leach* in *Cooper v. De Tastet*; and he admitted that an agent could not,

as

(a) 3 *Mo. & Scott*, 180.

(b) 2 *Ves.* jun. 101.

(c) 2 *V. & B.* 407.

(d) 3 *Mad.* 277.

(e) 3 *Mad.* 47.

(g) 1 *Taml.* 177.

(h) 4 *Sim.* 218.

(i) Now reported, 2 *Russ. & Mylne*, 608.

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as agent, file a bill of interpleader against his principal, unless under special circumstances; but his Lordship thought that the relation of principal and agent had not been constituted in that case. *Cooper v. De Tastet* and *Pearson v. Cardon* were cases of disputes between partners; and if two partners jointly deliver goods to an agent, and afterwards quarrel, and claim the goods separately, it may be very proper that the agent should be able to compel them to interplead. The case cited from *Viner* was one in which goods were delivered to the agent by several persons, not by one person, as in this instance. The bill contains no suggestion that *Thornton* is otherwise than a perfectly honest and innocent party, without knowledge of *Daniloff's* claim.

The characteristics of a real case of interpleader are, that the holder of the goods being under a single liability only, is yet subject to be vexed by more than one claim. The establishment of the title of one claimant, however, is a discharge of the title of all the others. There is no case of interpleader where the holder has made himself personally liable to several persons. All the cases cited establish that definition of interpleader. It is quite possible that the title to goods may be in one person, and, at the same time, a right of action for them may be in another person. The Vice-Chancellor said, in giving judgment in this case, that the title to the goods would not necessarily come into question in the action between *Thornton* and the Plaintiffs. A court of equity would not restrain him from proceeding at law upon the Plaintiffs' agreement.

[*The LORD CHANCELLOR.* If what has taken place amounts to an independent contract, it is one which cannot be decided between the parties in this suit. Then comes the question, whether what has taken place

place does amount to an independent contract. The Plaintiffs say it is, in fact, a mere question of title.]

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Whether there is an independent contract or not, is a question which must be tried at law; the only question which can arise at law will be, whether the letter and the dealing stated in the bill were founded on good consideration between *Thornton* and the Plaintiffs. Any actual alteration, by subsequent dealing on the part of *Thornton*, cannot, at law, make any difference; but it is admitted, on the other side, that alterations by subsequent dealing on *Thornton's* part, might affect the right of the Plaintiffs to compel interpleader. If the right be not clear, there is a question at law upon what passed between the Plaintiffs and *Thornton*; the question is not only between *Daniloff* and *Thornton*, but between the Plaintiffs and *Thornton*. The only case opposed to the positions assumed by *Thornton* is *Pearson v. Cardon*; but Lord *Brougham*, in giving judgment in that case, said, that there could be nothing more alarming, than that a wharfinger should be allowed to say, that he does not hold goods for the person who has deposited them with him. The ground of the ultimate decision of that case was the partnership between the parties.

The case of *Adamson v. Jarvis* (a) shews, that if the conduct of *Raikes* and Co. has led the Plaintiffs into difficulty, the Plaintiffs have their remedy against them. It is an essential qualification, both at law and in equity, of the right to compel interpleader, that the person seeking to enforce that right should be in a condition of complete neutrality; that he should have no interest in the question, and that he should be quite indifferent
which

(a) 4 Bing. 66.

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which party succeeds: *Mitchell v. Hayne* (a). It is not indifferent to the Plaintiffs which of the Defendants shall succeed. *Thornton* raises a personal claim against the Plaintiffs. If *Thornton* recovers the iron from the Plaintiffs, they will have also to answer for its value to *Daniloff*. The Plaintiffs have a lien for wharfage as against *Thornton*, but not as against *Daniloff*; they are not, therefore, perfectly neutral: *Braddick v. Smith*. (b) In that case Lord Chief Justice *Tindal* seems to have considered that a wharfinger, claiming a lien on the goods, as in the present case, could not maintain a bill of interpleader: so, the holder of goods cannot compel persons claiming them to interplead, if the difficulty in which the holder is placed by the conflicting claims has been occasioned wholly or in part by his own acts: *Slingsby v. Boulton* (c), *Belcher v. Smith*. (d) The letter of the 8th of *March* and the transfer gave *Thornton* a clear right to obtain from the Plaintiffs either the iron, or damages to the extent of its value. On what principle is this Court to say that the benefit of that letter and that transfer is to be taken from *Thornton*? The object of this bill is to obtain a declaration that the case is to be dealt with as if the letter and the transfer had never existed; to put *Thornton* in just the same condition as if the Plaintiffs had filed a bill, and obtained a decree for setting aside the letter and transfer on the ground of fraud.

Mr. *Maule*, in reply.

It is quite clear that the decision in *Cooper v. De Tastet* was founded upon an assumption that a person with whom goods had been deposited by another who was not the owner, could after a demand made by the true

(a) 2 *Sim. & Stu.* 63.

(c) 1 *V. & B.* 534.

(b) 2 *Mo. & Scott*, 151. *S. C.*
 9 *Bing.* 84.

(d) 9 *Bing.* 82.

true owner, defend himself from the true owner's claim, by re-delivering the goods to the person from whom he had received them. That assumption is erroneous, and the decision is clearly overruled by *Pearson v. Cardon* and *Mason v. Hamilton*. It will not always follow, as Lord *Brougham* appears to have supposed in his judgment in *Pearson v. Cardon*, that there can be no case in which an agent can file a bill of interpleader against his principal: for instance, if an agent were directed by his principal to cut down a tree, and a third person were to claim the tree, as being the owner of the land upon which it stood, the agent would be entitled to file a bill of interpleader in such a case. It is said that the letter of the 8th of *March* amounts to an attornment; but an attornment does not make a title; *Rogers v. Pitcher*. (a) That letter, having been written in ignorance of the fact that *Raikes* and Co. had no authority to pledge the goods, did not amount to an attornment. *Thornton* and *Daniloff*, in their respective actions, claim identically the same thing, in identically the same form; and when that is the case, interpleader will lie. If it were the rule that interpleader should lie only where the conflicting claims were to be tried upon the same evidence, there would be an end to the jurisdiction of interpleader altogether. The evidence is always in some respects different. If the iron, having been deposited with the Plaintiffs by *Raikes* and Co., had been, by the order of *Raikes* and Co., actually delivered by the Plaintiffs to *Thornton*, and *Thornton* had re-delivered it to the Plaintiffs, and the Plaintiffs had given him an acknowledgement that they held it for him, and then the claim of *Daniloff* had been made, *Thornton* might have brought an action against the Plaintiffs upon the contract made by the acknowledgement; but it cannot be said that in such a

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(a) 6 Taunt. 202.

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case interpleader would not lie. The circumstances of the present transaction, however, cannot be distinguished from such a case. The letter and transfer do not amount to more, if so much as, a delivery to *Thornton*, and a re-delivery to the Plaintiffs to hold on his behalf. The letter and the transfer do not create a more binding contract than would have been implied between the parties, if the letter had never been written, and the transfer had never been made. It is said that *Raikes* and Co. would be bound to indemnify the Plaintiffs against the consequences of delivering the iron to *Thornton*; but the Plaintiffs are not bound to rely on such an indemnity; and besides, the law will not imply or enforce an indemnity, for doing a thing which is unlawful: and upon this principle, an indemnity given to the editor of a newspaper for inserting a libel cannot be enforced. There is no ground for depriving the Plaintiffs of the right which they would have if the letter had not been written; that letter being a statement of a fact which might have been proved in some other way. If there had been an actual contract, and an action upon the contract had been brought, instead of an action of trover, the result could only have been the same in effect; namely, damages. It has been long settled that it can make no difference whether the action is in the form of tort, or of contract; but here, there is not even that difference, because the letter is a mere statement of a matter of fact.

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The LORD CHANCELLOR.

This was an appeal from an order of the Vice-Chancellor, allowing a demurrer of the Defendant, *Henry Sykes Thornton*, to the bill, which is a bill of interpleader against this Defendant so demurring, and one *Pavel Daniloff*.

The

The question, therefore, turns entirely upon this, whether the statement in the bill constitutes such a case against the Defendant *Thornton* as entitles the Plaintiffs to the ordinary protection afforded by a bill of interpleader. [His Lordship then stated the allegations and the prayer of the bill.]

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The case tendered by every such bill of interpleader ought to be, that the whole of the rights claimed by the Defendants may be properly determined by litigation between them, and that the Plaintiffs are not under any liabilities to either of the Defendants beyond those which arise from the title to the property in contest; because, if the Plaintiffs have come under any personal obligation, independently of the question of property, so that either of the Defendants may recover against them at law, without establishing a right to the property, it is obvious that no litigation between the Defendants can ascertain their respective rights as against the Plaintiffs; and the injunction, which is of course if the case be a proper subject for interpleader, would deprive a Defendant, having such a case beyond the question of property, of part of his legal remedy, with the possibility at least of failing in the contest with his co-defendant; in which case the injunction would deprive him of a legal right, without affording him any equivalent or compensation. Such a case, undoubtedly, would not be a case for interpleader. A party may be induced by the misrepresentation of the apparent owner of property, to enter into personal obligations with respect to it, from which he may be entitled to be released by a court of equity; but such a case could not be a subject for interpleader between the real and pretended owners. In such a case, the Plaintiff would be asserting an equity for relief from a personal contract against one of the Defendants, with which the other would have nothing to do.

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It is familiarly said that there is no interpleader between landlord and tenant, or principal and agent; but it will be found that the reason for this lies deeper than might be inferred from the statement of this rule; and that it is to be considered not so much as an independent rule, as a necessary consequence of the principle of all interpleading. In both these cases, rights and liabilities exist between the parties, independent of the title to the property, or to the debt or duty in question, and which may not depend upon the decision of the question of title. It is true that in this case both the actions are actions of trover; but it was most properly admitted by the counsel for the Plaintiffs, that the dealings of the Plaintiffs with Mr. *Thornton* would be evidence for him in his action. Suppose then, that those acts, the transferring the iron into his name in the Plaintiffs' books, and the letter of the 8th of *March* 1834, should be held sufficient to procure for Mr. *Thornton* a judgment in his action, without inquiring whether Messrs. *Raikes* had or had not a legal right to exercise dominion over the property as they did, by ordering the transfer of it to Mr. *Thornton*, how could such a right be the subject of interpleader between Mr. *Thornton*, and Mr. *Daniloff*? In such a case there would be no question in common, and therefore nothing to be tried between them; Mr. *Daniloff* might obtain a verdict upon shewing his title to the iron; and Mr. *Thornton*, upon shewing that Messrs. *Crawshay* had come under a personal liability by their dealings with him, independently of the question of title. This Court cannot take from Mr. *Thornton* a right he may have obtained against Messrs. *Crawshay*, without substituting some mode of litigation by which he may enforce all his rights. In the case supposed, this could not be done in any litigation with Mr. *Daniloff*.

On

On the part of the Plaintiffs, it was contended that this case must be regulated by the rule in cases of bailment. It will be to be considered what that rule is; but that rule, if in favour of the interpleading, would not be decisive, because in the case of simple bailment, there is no personal undertaking, and no liability or right of action beyond that which arises from the legal consequences of the bailment.

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Hawes v. Watson (a) and other cases shew that Mr. Thornton may, from the acts of the Plaintiffs themselves, have a right against the Plaintiffs, independently of the question whether *Daniloff* be or be not entitled to the iron. This is a right which cannot be the subject of litigation between the Defendants, and what ground can there be for depriving Mr. Thornton of that right by injunction?

Up to a late period there does not appear to be any authority which could raise a doubt as to the rule of this Court, with respect to interpleading in cases of bailment.

The interpleader at law was where there was a joint bailment by both claimants.

In equity, it is defined to be where two or more persons claim the same debt or duty.

It is no exception to the rule that a tenant or an agent cannot file a bill of interpleader against his landlord or his principal, that where the landlord or the principal has created a subsequent interest in some other person, the tenant or agent may maintain such a bill; because, in such case, the same debt or duty is claimed, and

(a) 2 B. & C. 540.

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and it is the act of the person entitled to such debt or duty which creates the equity of the party owing it.

In *Nickolson v. Knowles* (a) Sir John Leach acted upon this principle, and refused an injunction in an interpleading suit by a broker, against those by whom he was employed, and another who claimed the property by a paramount title.

In *Cooper v. De Tastet* (b) Sir John Leach acted upon the same rule, and refused to a warehouseman, seeking to compel his principal to interplead with another person who had claimed the property, the benefit of an injunction. In that case, expressions are, by the report, attributed to the learned Judge, which it may be difficult to explain. It appears, however, that the judgment was not given from any written note, and he may perhaps have been misunderstood. And if the expressions were used, they can only be considered as *dicta*; the facts of the case not requiring any decision upon the point. The learned Judge is supposed to have said that the case would be different, if the Plaintiff had been owner of a bonded warehouse; but no reason is given for the distinction; and the circumstance of the warehouse being one appointed under the act to receive goods on bond, does not alter the relative situation of the owner and of the warehouseman.

Two decisions, however, are supposed to have thrown doubt upon this established principle in cases of interpleader; *Pearson v. Cardon* (c) and *Mason v. Hamilton*. (d) The first, as reported, would certainly seem to create some difficulty; the report attributing to the Vice-Chancellor

(a) 5 Madd. 47.

(b) 1 Tamlyn, 177.

(c) 4 Sim. 218. 2 Russ. & Mylne, 606.

(d) 5 Sim. 19.

cellor the expression that admitting that the Plaintiffs were agents for one party, yet that there was a claim made by another under a paramount title, and that his Honor was therefore of opinion that it was a case of interpleader. In this there must be some mistake; interpleader, as between agent and principal, being admissible only where the adverse claim is under a derivative, and not under a paramount title; and although the case on appeal before Lord *Brougham* is not reported (a), I have been furnished with a note of Lord *Brougham*'s judgment, and have the satisfaction to find that his Lordship, in affirming the Vice-Chancellor's order, recognises the established rule, and anxiously guards himself against being supposed to intend any infringement upon it; and he decided that case entirely upon its own peculiar circumstances, and upon the ground that the adverse claim was derivative and not paramount.

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In *Mason v. Hamilton*, the principal question was that of costs, the party who had given the notice having withdrawn his claim, though not till after the bill was filed; and as that was the party ordered to pay the costs, it is probable that the attention of the Court was not much directed to the point for which it is now cited; and even if that were otherwise, the case would be but a slight authority for the present, inasmuch as although the bailor had directed the bailee, the Plaintiff, to transfer the goods into the name of the party whose claim was afterwards acquiesced in, there was not, as in this case, any dealing between the bailee and such party, recognising his right, and contracting with him upon the footing of it. Besides which, if the Vice-Chancellor did express any such opinion as is there attributed to him, I have the satisfaction of knowing, from the Vice-Chancellor's

(a) The case is now reported, 2 *Russ. & Mylne*, 606.

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cellor's judgment in this case, that at a subsequent period, when the point was brought distinctly before him, he entertained an opinion in conformity with that which I have expressed upon this subject.

I have thought it right to enter thus fully into the case, not from any doubt I at the time entertained about it, but to remove an impression which seems to have been entertained, that those cases were to be considered as affecting the other cases in questions of interpleader.

The appeal must be dismissed with costs.

Of two Defendants to a bill, one only demurred; and the demurrer having been allowed by the Vice-Chancellor, the Plaintiff appealed. The order for setting down the appeal was served on the other Defendant's solicitor, who afterwards received a letter from the Plaintiff's solicitor, asking him whether he would consent to have the appeal advanced; and that Defendant appeared upon the argument, but was not allowed to be heard: Held, that he was not entitled to the costs of his appearance.

Sir *William Horne* and Mr. *Sidebottom* appeared for the Defendant *Daniloff*; but as he had not demurred, and consequently was not a party to the appeal, they were not allowed to be heard. They applied, however, for the costs of their appearance under the following circumstances:—

The order for setting down the appeal was served on *Daniloff*'s solicitor, who afterwards received a letter from the Plaintiffs' solicitors, informing him that an application was about to be made to have the appeal advanced, and requesting to know whether he would consent to its being advanced.

The LORD CHANCELLOR was of opinion that *Daniloff* was not entitled to the costs of his appearance upon the hearing of the appeal; and said, that although it was now the settled practice of the Court, that when a petition was served upon unnecessary parties who appeared, they were entitled to their costs, that case did not resemble
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Held, that he was not entitled to the costs of his appearance.

semble the present. The answer to a petition required the attendance of all parties concerned, and it became an order of the Court upon every party whom the petitioner chose to serve with it. The letter sent to *Dani-loff's* solicitor, in the present instance, was merely an unnecessary application to him for his consent to the appeal being advanced; it did not invite him to attend the hearing of the appeal.

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THE mode in which this petition of appeal came before the Court, the nature of the question which it raised, and the principal arguments by which it was supported, are stated in the judgment.

The *Solicitor-General*, Mr. *Temple*, and Mr. *Parry*, for the appeal.

Mr. *Jacob* and Mr. *Richards*, *contra*.

Of several suits instituted on behalf of infants, and for the protection of their property, the Court will give a preference to that which is capable from its frame of being most beneficially and effectually prosecuted, notwithstanding that in point of form the relief sought by another is more extensive.

The LORD CHANCELLOR.

In this case two bills were filed, both professing to be for the interest of the infants. The Master of the Rolls referred it to the Master to inquire which of the two was most for the interest of the infants. The Master reported that the first-mentioned suit, which was also

Trustees for infants, persisting in unnecessary litigation, ordered to pay the costs personally.

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the earlier in point of time, was most for their benefit; and, upon petition and cross-petition at the Rolls, Lord *Langdale* was of the same opinion, and made an order confirming the Master's report.

From this decision, Lady *Dorothea Louisa Campbell*, who is the mother of the infants, and the only adult Plaintiff in the second suit, and the next friend of the infants in that suit, brings the present appeal.

In the first bill the infants are Plaintiffs by the Rev. *Archibald Montgomery Campbell*, their next friend. This bill was filed on the 17th of *June* 1835. It sets out at large the will of Sir *James Campbell*, by which he gave to his wife Lady *Dorothea* for her life, all his plate and plated goods then in his possession, with remainder to the Plaintiff his son. To the Plaintiff his son, he gave certain other descriptions of plate; and he then bequeathed 15,000*l.* to the Defendants *Mackay, Campbell*, and *Home*, for his three daughters at twenty-one or marriage, with benefit of survivorship; the interest to be applied for their maintenance. The residue of his estate he gave to the same trustees, for his son at twenty-five, and if he should die before that age without issue, then for his daughters; and he appointed those trustees his executors, and also, jointly with his wife, the guardians of his children. This bill prays the usual accounts of the personal estate, against the executors and executrix; and after stating that Lady *Dorothea Louisa Campbell* had possessed herself of the testator's plate and plated articles, and also of some of the plate bequeathed directly to the Plaintiff her son, and of other parts of the personal estate, and that she had received from the testator 2000*l.*, part of his personal estate, for which she had not accounted, it prays against her an account of what she had so received.

On

On the 14th of *July* the second bill was filed by Lady *Dorothea Louisa Campbell* in her own right, and as the next friend of her children, stating the will, and praying the usual accounts of the estate, but also stating two deeds executed by the testator. The first of these instruments is his marriage settlement, dated *March* 1817, by which certain sums in the public funds were vested in the Defendants *Mackay* and *Campbell*, and two other persons, since deceased, upon trust, to pay to Lady *Dorothea* a jointure of 800*l.* *Irish* currency (which is the whole income of the sums so invested with the exception of a few pounds) for life, and the surplus income, for the maintenance of the children, and after Lady *Dorothea's* death, to divide the principal among the children. After the death of Lady *Dorothea*, the trustees, with the guardians to be appointed by the father, were to have a discretionary power to apply the income of this fund for the maintenance of the children, and to allow sums for their advancement out of the capital. By the second deed, which is dated the 22d of *July* 1834, a sum of 10,000*l.* was vested in the Defendants *Home* and Lord *Sligo*, upon trust for Lady *Dorothea* for life, with remainder to the children as she should appoint, and in default of appointment, equally. The bill states that in this deed there was a similar provision to that contained in the other, with respect to the maintenance of the children; although it was stated at the bar that there was no such provision in the deed.

The second bill then states that the funds under the first deed are standing in the names of the Defendants *Campbell* and *Mackay*, and those under the second deed, in the names of *Home* and Lord *Sligo*. It then states that Lady *Dorothea* invested in the *French* funds, in her own name, the 2000*l.* given to her by the testator, except

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except 300*l.* expended in paying debts, and that she holds that stock for the benefit of the children, but the bill denies that it forms part of the testator's estate. The only relief prayed with respect to these two trust funds is that, if necessary, new trustees may be appointed: but of the second deed, all the trustees appointed are now living; and of the first, two out of four are living, and no complaint is made as to the mode of investment, or the management of the trust funds. (a)

It is also to be observed that the infants have no present interest in these two trust funds, except in the surplus of the income of the stock comprised in the first trust, amounting to a very few pounds only; and no complaint is made that such surplus has not been applied according to the trusts.

The Defendants, *Campbell*, *Mackay*, and *Home*, thought it right to put in a demurrer to this second bill, upon the ground of multifariousness. The Vice-Chancellor over-ruled the demurrer. The Defendants then thought it right to appeal from that order, and upon the appeal I affirmed the decision of his Honor. (b) The order of the Vice-Chancellor was dated the 5th of *January* 1836; and on the 4th of *February* following, the Master made his report, approving of the first suit in preference to the second. On the 3d of *March* 1836, the Master of the Rolls confirmed that report, and dismissed Lady *Dorothea's* petition for leave to except to it. All this litigation is much to be regretted, not only as it creates great expense, which must

(a) See *Campbell v. Mackay*, vol. i. p. 603. *suprà*, where the substance of the second bill is stated more fully.

(b) *Campbell v. Mackay*, *ubi suprà*.

must in some measure fall upon the infants, but as it evinces a spirit of hostility between those who ought to have but one common object, the interest of the children, a spirit which cannot but be highly prejudicial to them.

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As the matter, however, has been brought before me, I am under the necessity of disposing of it; and I entirely agree in the view taken by His Lordship the Master of the Rolls. I think the introduction of the two deeds into the second bill quite useless as to any benefit to the infants, though I did not think that it made that bill demurrable for multifariousness. But my reason for preferring the first suit is, that I think Lady *Dorothea* ought to be a Defendant. The transaction as to the 2000*l.*, according to the representations in both bills, requires, at least, investigation, which it cannot properly receive in a suit in which she is a Plaintiff.

The only objection to the first suit is an allegation in the second bill that the next friend and the accounting parties are under an understanding together as to the suit; by which nothing more is meant than that the suit is instituted, if not at the instigation, at least with the concurrence, of the Defendants the executors. There is nothing whatever to lead me to suppose that any improper protection is intended to be afforded to the accounting parties from that circumstance. The relationship of some of the Defendants to the infants, and the high character which they are acknowledged to bear, preclude this supposition; and were it otherwise, the necessary attendance of Lady *Dorothea* and her professional advisers throughout the case, would afford an effectual protection to the interests of the children.

I therefore

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I therefore do not think that any substantial objection has been stated to the first suit; and for the reason I have stated, I think it greatly preferable to the second. In such a case as this, where another next friend takes upon himself to file a second bill, it is incumbent upon him to shew some defect in the first suit, or a decided preference in the second. If their merits are only equal, the priority must prevail.

I therefore affirm the order of the Master of the Rolls.

When the demurrer was disposed of, I reserved the costs until I should have decided this appeal. I have now affirmed both the orders: I think that neither of them ought to have been made the subject of appeal.

It is certainly not usual to make trustees for infants or their next friends pay personally the costs of proceedings; but it would not be a useful exercise of the discretion of the Court to abstain from making an exception, when a course of unnecessary litigation appears to have been adopted. Lady *Dorothea*, indeed, is not only acting as next friend for her children, but in her own right; and I think the trustees, if justified in demurring at all, instead of trusting to the result of an inquiry as to the two suits which were then pending, might have been satisfied with the decision of the Vice-Chancellor upon the demurrer, which would have been a complete exoneration to them. I think, therefore, that both appeals should be dismissed with costs, and I make no order as to paying any costs out of the infants' property.

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CAMPBELL v. MACKAY.*

THIS was an appeal by the Defendants, the executors of the late Sir *James Campbell*, against an order of the Vice-Chancellor, by which the Plaintiff, Lady *Dorothea Louisa Campbell*, who was jointly named with them as an executor of Sir *James's* will, and as one of the guardians of the infant Plaintiffs, was permitted to remove the infant Plaintiffs, her children, out of the jurisdiction, for the purpose of establishing their residence in *France* or *Italy*.

Sir *William Horne*, Mr. *Wigram*, and Mr. *James Russell*, for the appeal.

Mr. *Knight*, and Mr. *Parry*, in support of the Vice-Chancellor's order.

The facts of the case, and the general effect of the evidence on both sides, are stated and summed up in the judgment.

The LORD CHANCELLOR.

The petition, upon which the order under appeal was obtained, stated that it was necessary for the health of the children that they should reside in the south of *Europe*, or in some climate warmer than that of *England*. The original order permitted Lady *Dorothea* to take them "to the south of *Europe*, or elsewhere, out of the jurisdiction;" but as it was subsequently altered, and as it now stands, it permits the infants to reside in *France*

1836.
Nov. 10, 11.
1837.
Jan. 16.
The Court will not make an order, permitting its infant wards to be removed out of the jurisdiction, with a view to their residing permanently abroad, except in a case of imperative necessity; as, where it is clearly proved that a constant residence in a warmer climate is absolutely essential to their health.

Such an order, if made, ought to comprise a scheme for the education of the infants, as well as a provision for informing the Court from time to time of their progress and condition, and an undertaking to bring them within the jurisdiction when required.

or

* See the preceding case.

1837.
Jan. 16.

1837.

CAMPBELL

v.

MACKAY.

or *Italy*. With this order, which goes on to direct the usual inquiries relative to the ages and fortunes of the infants, and the sums that would be proper to be allowed for their maintenance, respectively, no scheme is connected for the education and superintendence of the children; no undertaking or security is to be given, that they shall be brought back within a limited time; and no direction or provision is introduced, by which the Court may be informed at any future period of their actual condition or progress. [His Lordship here stated in detail the substance of the affidavits which had been read, as well in support of the appeal, as in opposition to it, and proceeded]:—

Such is the evidence upon which I am required to come to a decision which may most materially affect the future prospects of these children; and the first question is, whether such a case is made out as to justify me in permitting the children to be kept abroad and out of the jurisdiction of the Court.

It cannot be now said that the Court will not in any case permit its wards to be taken out of the country. No doubt, circumstances may arise under which it would be most inexpedient to adhere strictly to the general rule against permitting an infant ward of the Court to be taken out of the jurisdiction; because cases may occur in which the health, and possibly the life of the ward, may depend upon his removal to another climate. Such instances, however, are, I trust, very rare; and so lately as in the year 1801, in the case of *Mountstuart v. Mountstuart* (a), Lord Eldon appears to have said that the Court never makes an order for taking the infant out of the jurisdiction. Subsequent decisions shew that exceptions are sometimes made to the rule, but

(a) 6 Ves. 363.

but such exceptions are and ought to be very rare. Since I have held the Great Seal I have had reason to lament that the rule has not been more strictly adhered to. In a case referred to in a note in *Mr. Jacob's Reports* (a) it will be seen with what difficulty Lord *Eldon* was induced to permit a father to take his child, a ward of the Court, out of the jurisdiction, and with what guards he thought it necessary to protect the infant against the probable consequences of that permission; and in *De Manneville v. De Manneville* (b) his Lordship restrained a father from removing his child to a foreign country.

1837.
CAMPBELL
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MACKAY.

Independently of this well established rule of the Court, and the principle upon which it proceeds, I am convinced that scarcely any thing can be more injurious to the future prospects of *English* children, and particularly of *English* boys, than a permanent residence abroad. Without the proper opportunities of attending the religious service of the church to which they belong, separated from their natural connections, estranged from the members of their own families, withdrawn from those courses of education which their contemporaries are pursuing, and accustomed to habits and manners which are not those of their own country, they must be becoming, from day to day, less and less adapted to the position which, it is to be wished, they should hereafter occupy in their native land.

In addition to all these considerations I find, in the present case, the most anxious wishes expressed by the father of these children, that they should be settled in this country and receive a purely *English* education, and that the son should pursue that profession in which
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(a) *Jac.* 265.

(b) 10 *Ves.* 52.

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the father had himself gained considerable emoluments and the highest honors. It is needless to observe that the law, which permits the father to appoint the guardians of his children, will pay the highest respect to the expression of his wishes as to the mode of their education.

All these considerations, however, must yield, and the hopes, wishes, and projects of the father must be disappointed, if an irresistible necessity be proved to exist for the permanent residence of the children abroad. I say *permanent*, because if the grounds, alleged in this case, for the permission to leave the country be sufficient for that purpose, there is no reasonable hope that they will cease to exist during the minority of the wards. The ground on which the permission is sought is not any accidental disease, which a temporary residence abroad may help to eradicate; but supposed infirmities in the constitutions of three of the children, all of different kinds, but all supposed to lead to the unusual result of an incapacity, without danger, of living in the climate of this country.

Such being my view of the evil not only likely but, in my opinion, certain to result from the long continuance of the permission granted by the Vice Chancellor's order, I must next consider the weight and effect of the medical evidence, in order to ascertain whether the danger be such as to justify me in exposing these wards, and particularly the boy, to evils so certain and so great.

[His Lordship here entered into a minute and critical examination of a number of affidavits made by medical gentlemen, who had been professionally consulted with respect to the health of the children, and their supposed constitutional tendencies; and came to the conclusion
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that although the evidence was in some decree conflicting, it decidedly preponderated in favour of the opinion that a residence in the South of *England*, especially in some spot where the air was mild and dry, would in all probability be as well suited to the constitutions of the children, as any place which could be fixed upon in *France* or *Italy*. His Lordship further remarked, that the apparent discrepancy in the affidavits upon this point might be explained by the circumstance that most of those medical gentlemen who were disposed to recommend a residence abroad, appeared to have founded their opinions, rather upon the statements which they had received from Lady *Dorothea*, with respect to her past experience, than upon personal observation and knowledge. His Lordship next proceeded to examine the amount and value of the evidence alleged to be furnished by the experience of the past; and arrived at the conclusion that the evidence with respect to the result of that experience was far from being clear or decisive. His Lordship then continued as follows:—]

I am therefore of opinion, that there is not in the medical testimony, or in the evidence of the result of past experience sufficient to justify me, by affirming the order of the Vice-Chancellor, in sanctioning the permanent residence of these children abroad, and thereby exposing them to the unquestionable evils of such a course. To the evidence furnished by Lady *Dorothea* herself, I might have added, indeed, the fact that, after having obtained the order of the Vice-Chancellor, upon the ground that a milder, drier, and warmer climate was required for the children, some of the medical opinions specifying the South of *France* or *Italy*, I find them passing the winter in the neighbourhood of *Paris*.

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 v.
 MACKAY.

Having come to this conclusion upon the principal question raised by the order of the Vice-Chancellor, I need do no more than mention some other matters, as to which I should have thought it necessary to vary the order, even if I had concurred in the question of residence abroad.

The effect of that order is to place the maintenance and education of the children absolutely in the hands of one of four guardians, the other three dissenting, and without any inquiry before the master, as to a scheme for their maintenance and education; and in permitting that one guardian to take the children abroad, it does not provide any security for their return, or make any provision by which the Court could, at any time, be informed of the state of the children, or the progress of their education, a matter which, in the case in *Mr. Jacob's Reports (a)*, Lord *Eldon* thought necessary even in the case of a father. I am aware that these directions were not asked of the Vice-Chancellor; and I mention the circumstance only that the form of the order may not be drawn into precedent.

I have now gone through this most distressing case. I must discharge so much of the Vice-Chancellor's order as permits the residence abroad. The rest of the order may stand; but there must be added to it that, which cannot be dispensed with when guardians do not agree as to the management of their wards, namely, a reference to the Master to approve of a scheme for the maintenance and education of the children.

I do not mean to leave to the Master the reconsideration of the question as to residence abroad. The order, therefore must direct the Master, in approving of
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(a) 1 Jac. 265.

any scheme, to consider that the future residence of the children will be in this country.

1887.


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 v.
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I am not desirous however of requiring the immediate return of the children. They have been taken abroad under the authority of the Court, and a hurried return must be inconvenient and, at this season of the year, might be hazardous. It will be better to let the severity of the winter pass away, and to take the first favourable opportunity on the return of the spring, to settle the journey to this country. There is nothing to apprehend from prolonging their residence abroad, until it can be conveniently and satisfactorily terminated. It is to the protracted and indefinite duration of it that the objections apply.

I cannot dismiss this subject without expressing my earnest hope that, now that the important subject of contest is disposed of, the guardians of these children will endeavour, by coming to a proper understanding among themselves, to co-operate for the welfare of their wards. Without such co-operation, the care and protection of this Court, must be comparatively ineffectual.

I have no reason to doubt, but on the contrary I see much reason to be convinced of the devotion and affection of Lady *Dorothea* towards her children; and possibly that very devotion and affection may have led her into error. But there certainly appears from her correspondence to be much misconception as to the position in which she is placed, with respect to her children. Every attention ought to be paid to the opinions and to the wishes of a mother; but in point of authority she is upon an equality with the three other guardians. There is, therefore, nothing to justify any attempt on her part to oppose their interference, or to dispute their au-

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thority: and I hope that upon reflection, *Lady Dorothea* will see reason to think that Colonel *Mackay* and the other guardians have, under trying circumstances, shewn much temper, moderation, and self-command, as well as fairness, in the execution of the delicate and important duty cast upon them by the testator. In all that they have done, they appear to have had no other object than the welfare of the children.

The Court will be desirous as far as possible, to consult the feelings and wishes of the mother, but that desire will not induce it in any particular to depart from the course, which it may think most conducive to the interests of its wards.

If *Lady Dorothea* can bring herself to co-operate with the other guardians, and readily assist in carrying into effect such plan for the education of her children as the Court may approve, she may be assured that she will be doing that which her duty towards them requires, and that which is most likely to promote their welfare and to secure to herself the pleasure and satisfaction which can only result from their future prosperity.

1836.
 Dec. 15.

In re WATERS, a supposed Lunatic.

To avoid inconvenience and expense, a commission was directed to issue into *Middlesex*, although the supposed lunatic was residing in *Herts*.

THE petition of *Mary Waters*, the lunatic's mother, prayed that the commission of lunacy which, by an order made in this matter on the 2d of *December* instant, would be issued into the county of *Hertford*, might be issued into the county of *Middlesex*.

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By the terms of the order, the commission was directed to be executed "in or near the place of abode of the supposed lunatic, with a good jury of the county and neighbourhood where the lunatic resided." The lunatic being resident at *St. Alban's* the commission would, according to the usual course, be issued into *Hertfordshire*.

1836.
In re
WATERS.

Mr. *Richards*, in support of the petition, stated that the property of the lunatic was small, and that the present application was made to save the expense of taking medical witnesses down from *London*.

The LORD CHANCELLOR ordered that the commission should issue into *Middlesex (a)*.

(a) See the observations of Lord *Eldon* in *Ex parte Baker*, 19 Ves. 340. In the case of *In re Mills*, Feb. 1830, the supposed lunatic resided at *Stamford*, under the care of Dr. *Willis*. He never had any fixed place of residence, and lived chiefly in lodgings. The principal witness resided in *Middlesex*, into which county Lord *Lyndhurst* directed the commission to issue.

In re TOTTENHAM.

1837.
Jan. 27.

A PETITION was presented by *John Nicholas Lucas* and *Letitia* his wife, and *Mary Tottenham*, (the parties who sued out the commission,) whereby, after stating Where an individual is found lunatic under an inquisition taken in England, the appointment of committees of his person rests with the Lord Chancellor of Great Britain, notwithstanding that the property of the lunatic is situated in Ireland, and that a transcript of the record of the inquisition has been transmitted to the Chancery of that country, with a view to the appointment of committees of his estate by the Lord Chancellor of Ireland.

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stating the inquisition taken in *England*, and the finding of the jury, and that the whole of the real estate of the lunatic was situated in *Ireland*, and that he was possessed of personal estate there, and had not any property in *England*, with the exception of some shares in the *Aire and Calder Navigation*, the petitioners prayed a reference to the Master, to approve of a committee of the lunatic's person, and to inquire who were his heir-at-law and next of kin; and also that a transcript of the record of the inquisition taken in *England* might be forwarded to *Ireland* (pursuant to the 1 *W. 4. c. 65.*), in order to the appointment of a committee of the lunatic's estates in that country.

Upon the hearing of this petition, the Lord Chancellor, at the request of the lunatic's son-in-law and daughter, who stated it to be their intention to traverse the inquisition, ordered so much of the petition as related to the appointment of a committee of the person, to stand over; and directed that a transcript of the inquisition should be forthwith transmitted to the Chancery of *Ireland*. The time limited by the act of parliament for traversing inquisitions in lunacy having subsequently expired, the application for the appointment of a committee of the lunatic's person was renewed; and by an order of the 19th *December* 1836, the Master was directed to approve of committees of the person, and also to inquire as to the heir-at-law and next of kin of the lunatic. The parties who obtained this order however, instead of prosecuting it before the Master, petitioned the Lord Chancellor of *Ireland*; and under an order of Lord *Plunket*, made in the absence of the lunatic's next of kin, Mr. and Mrs. *Lucas* were appointed the committees of the person.

An application was now made by the lunatic's daughter and her husband, for leave to prosecute the order of the

19th

19th of December 1836, notwithstanding the nomination made by the Lord Chancellor of Ireland.

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TOTTENHAM.

Mr. *Girdlestone*, in support of the application, contended that the proceedings of Mr. and Mrs. *Lucas* had been wholly irregular, having been taken behind the back of the lunatic's children; they were likewise a fraud upon the Court, and were intended to evade its authority. The lunatic resided in this country; the inquiry had been holden here; and under these circumstances, the jurisdiction belonged properly and exclusively to the Lord Chancellor of Great Britain.

Mr. *Wigram*, for Mr. and Mrs. *Lucas*, submitted that the affidavit of the solicitor shewed, that the practice in *Ireland* in a case like the present, where all the property was in that country, had been for the Lord Chancellor of *Ireland* to appoint committees of the person as well as committees of the estate. Mr. and Mrs. *Lucas* however, had no objection to the appointment being made under the authority of this Court, if his Lordship considered that to be the more regular course.

The LORD CHANCELLOR said, that the mode in which the parties had dealt with his order was practically to defeat it. He could not permit the person of a party, found lunatic and resident in this country, to be placed under the management of a committee appointed in *Ireland*, or to be under any control not subject to his Lordship's jurisdiction. He should therefore compel the parties to apply for the discharge of the order of the Lord Chancellor of *Ireland*, nominating them committees of the person. The Master on the reference might possibly approve of those same individuals to be the committees; but their fitness would be matter for his consideration, and the order of the 19th of December, must

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In re
TOTTENHAM.

must be drawn up and prosecuted in the regular way. (a)

(a) A note of the following cases, with reference to this subject, was furnished to the Lord Chancellor by the Secretary of Lunatics.

In re Earl of CARYSFORT, August 21. 1828. — The lunatic was possessed of a small personal property in *England*. His estates were in *Ireland*, and produced 11,000*l.* per annum. Committees of the person and estate were appointed in *England*, and a transcript of the inquisition forwarded to *Ireland*, in order that a committee of the estates might be likewise appointed there.

In re KNOX, 1829. — The lunatic was possessed of an unascertained interest in the re-

siduary estate of his father, in *England*, and also of stock in the bank of *Ireland*. Committees of the person and estate were appointed in *England*, and a transcript of the inquisition forwarded to *Ireland*.

In re NEWPORT, 1829. — The inquisition issued in *Ireland*, where Mr. Newport resided. The chief part of his estates being in *England*, a transcript of the inquisition was forwarded from *Ireland* to *England*, and a committee of the estates in *England* was accordingly appointed by the Court here. The order was silent as to the appointment of a committee of the person.

1836.
Dec. 9, 10. 13.

LOCKE v. COLMAN.

In cases in which, but for the existence of a trust, the title to real property would be to be tried at law, and a party would consequently have repeated

opportunities of trying it, the Court of Chancery is unwilling to bind the rights of the parties by a single trial, especially when it appears likely that more light will be thrown upon the subject by another trial.

A second trial of an issue with respect to a copyhold custom, was directed in a case, in which the result of the first trial would have gone far to establish within an extensive district, a rule of inheritance of which no distinct precedent had been proved in evidence.

THE order made upon the hearing of the appeal in this cause, of which a report has been given *antè*, vol. i. p. 423., was to the effect that the parties should proceed to a trial at law at the then next summer assizes for the county of *Somerset*, upon the following issue, viz., whether the Plaintiff, *Susanna Locke*, was, on the 5th

5th of *February* 1819, the heir of *Robert Marke* in the pleadings named, according to the custom of the manor of *Taunton Deane*; and in such trial the Plaintiff was to be Plaintiff at law, and the Defendants were to be Defendants at law; and upon the trial of the issue the Defendants were to admit that *Robert Marke* above mentioned (the settlor in the pleadings named) survived *Grace* his wife, and died on the 5th of *February* 1819.

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The issue was accordingly tried before Mr. Justice *Williams* and a common jury, at the last summer assizes for *Somersetshire*; and a verdict was found for the Defendants.

Mr. *Erle*, Mr. *Jacob*, Mr. *Hayter*, and Mr. *Crowder*, on the part of the Plaintiff, now moved for a new trial, upon the ground of a misdirection by the learned Judge, and the improper rejection of evidence tendered, and on the ground also that the verdict was contrary to the balance of the evidence which was received. They said that the learned Judge, in his charge to the jury, had stated the question as being, whether, a common law heir or an heir according to the custom, was to prevail; his Lordship adding that the common law must prevail, unless the Plaintiff, who claimed as heir according to the custom, could clearly establish by positive evidence, that branch of the custom under which she would be entitled. The evidence said to have been improperly rejected at the trial, consisted of the answer of *Southwood*, the Defendant in the cause of *Locke v. Southwood* (a), by which he had admitted that the Plaintiff was, according to the custom, the heiress of the settlor at the time of his death, if his widow was not; and a surrender and admittance in the adjoining manor of *Taunton late Priory*,

(a) *Ante*, vol. i. p. 411.

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v.
COLMAN.

Priory, the lands in which were alleged to be surrendered to be held according to the custom of *Taunton Deane*: but it did not sufficiently appear that the question of the admissibility of this surrender and admittance had been distinctly raised.

Sir *W. Horne*, Mr. *Parry*, and Mr. *Kinglake* opposed the motion.

Mr. *Erle*, in reply.

Dec. 13.

The LORD CHANCELLOR.

The Plaintiff claims as customary heir living at the death of the settlor's widow in 1819. The Defendants claim through the settlor's widow and his daughter, who died in the widow's lifetime.

By the decision of the House of Lords, the customary heirs of the settlor, living at the time of the death of his widow, are the parties entitled; and to try whether the Plaintiff was such customary heir, the issue directed was, whether the Plaintiff was on the 5th of *February* 1819 (being the day of the death of the settlor's widow), the heir of *Robert Marke*, according to the custom of the manor; and in order to raise the question, the parties were to admit that *Robert Marke* survived his wife, and died on the 5th of *February* 1819. The Defendants, though holding under a title which the House of Lords have declared to be invalid, are entitled to retain the property till it be claimed by some persons shewing themselves to be the customary heirs of *Robert Marke* on the 5th of *February* 1819; but the Defendants do not claim through any common law heir of *Robert Marke*, or
any

any person who can be considered as customary heir, the House of Lords having negatived such title; but according to the decision of the House of Lords, the lands belong to the Plaintiff, or to such other person as may appear to have been the customary heir on the 5th of *February* 1819. It is also to be observed, that the Defendant in this cause disputes the Plaintiff being the customary heir of the settlor, and insists that *John Marke* the youngest son of the youngest nephew of the settlor, is such customary heir.

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The question therefore is in no respect between a customary heir and a common law heir; but whether, by the custom, the Plaintiff, as youngest sister, be the customary heir, or the person set up as heir by the answer, namely, the youngest son of the settlor's youngest nephew. The jury, by finding for the Defendant, have negatived the Plaintiff's title as customary heir. The effect of that verdict, if it stands, will be conclusive against the Plaintiff's claim, and will go far to establish within an extensive district, a rule of inheritance of which, it is admitted, that there is not at present any distinct precedent. It is a case therefore in which it becomes me to be very certain that the verdict is right, before, by affirming and acting upon it, I give effect to such important consequences.

If the property had not been in trust, and the title of the Plaintiff had been to be asserted at law, she would have had repeated opportunities of trying her right. In this Court it is matter of discretion whether any second trial shall be had; but in exercising that discretion, this Court may properly have regard to what would have been the rights of the parties at law, and is therefore unwilling to bind the rights by a single trial.

I had

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COLMAN.

I had occasion to consider the question in a case of *Mudd v. Suckermore* (a), which came before me at the Rolls. That, indeed, was a case in which the Court had left the Plaintiff to establish his case at law in an ejectment, only removing the legal impediments; but in that case as in this, though the Court treated the question as one to be determined by the result of proceedings at law, it reserved to itself ultimately to adjudicate upon the rights of the parties. In both, the consideration was, whether this Court would, under the circumstances, come to the adjudication upon the result of one trial at law, it appearing to the Court that more light upon the subject was likely to be obtained by another trial: and in the case of *Mudd v. Suckermore* no objection was made, to the satisfaction of the Court, of any thing that had taken place at the former trial. In that case I referred to the several authorities for that purpose, to which may be added *Baker v. Hart*. (b) In *Edwin v. Thomas* (c) it was thought to be a sufficient ground for a new trial, that the result concerned all the copyholders of a manor, as is the present case. It is, however, sufficient for the purposes of this case to say, that the Court will not bind the inheritance by the result of a single trial, if there be reason for believing that a second trial may afford more satisfactory grounds, upon which a final adjudication of the rights of the parties may be founded. I cannot say, that I am so satisfied with what took place at the trial, as to justify me in disposing of the property according to its result.

Being therefore of opinion that a new trial must take place, I avoid entering into any discussion of several of the points which have been argued at the bar,

(a) *Rolls*, 1835.(b) 3 *Atk.* 542.(c) 2 *Vern.* 75.

bar, or making observations upon the effect of the evidence adduced, as I am desirous that the case should be submitted to another jury with as little prejudice as possible. I must, however, observe, that in submitting the case to the jury, the learned judge does not appear to have sufficiently called their attention to the question which this Court has to decide, and which it required the assistance of the jury to determine, namely, whether according to the custom of the manor the Plaintiff be the customary heir; that question arising, not between a party claiming under the custom against a common law heir, but in a case in which the heirship is regulated by the custom. According to the manner in which the jury were called upon to view this subject, the Plaintiff failed, because the evidence was not thought sufficiently strong to repel the presumption which they were directed to entertain in favour of what was termed the common law. It is obvious that if a claim should be made by the youngest son of the youngest nephew of the settlor, and another issue should be directed to try his right, another jury, yielding to the same presumption, would probably find a verdict against his claim: the result would be that although it is clear that one or other of these parties is entitled, the claim of both would be negatived. It also appears to me from the learned Judge's notes of his summing up, that sufficient weight was not given to the evidence of reputation; which, coming as it did from *Southwood*, the lord of the manor, and from *Robert Marke*, a party interested against the opinion of the custom he expressed, was, I think, in the obscurity in which the Court Rolls left the subject, entitled to considerable weight.

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As to the objections from the rejection of the evidence of the custom in *Taunton late Priory*, and of
 Mr.

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Mr. *Southwood's* answer, I certainly should not have directed a new trial upon either of those grounds.

As to the custom of *Taunton late Priory*, it appears that the preliminary proof to raise the question as to the admissibility of that evidence, was not brought forward. And as to Mr. *Southwood's* answer, independently of the objection to its admissibility, it ought not, if received, to have had any weight. It is only an admission that *Susannah Locke* was customary heir; but why, or under what circumstances, or whether upon any grounds founded upon the custom of the manor, as contended for by the Plaintiff, is not stated. I must therefore leave these two pieces of evidence to be dealt with at the next trial, as the learned Judge who shall preside may think proper, according to the circumstances brought forward at the trial.

Purposely therefore, avoiding to go further into the discussion of the case, I think myself bound to direct a new trial of the issue.

The costs of the motion were reserved; and, at the request of both parties, it was ordered that the issue should now be tried by a special jury.

1837.

VIGERS v. Lord AUDLEY.

Feb. 7.

IN this case, *Angelo Solari*, one of the Defendants, having suffered the time for answering to expire, an attachment was issued against him. He then filed an answer and demurrer to the bill; and the Vice-Chancellor having ordered the answer and demurrer to be taken off the file for irregularity, a motion was now made that his Honor's order might be discharged.

A party against whom an attachment has issued for want of an answer, cannot file an answer and demurrer to the bill, even although no further step in the process has been taken; and it makes no difference in this respect, that the demurrer is only to a part of the discovery sought, and not to the relief.

Mr. *Wigram*, for the motion.

The answer put in by the Defendant *Solari*, is a full and *bonâ fide* answer, so far as relates to the merits of the case. This demurrer applies to so much of the bill as required him to answer and set forth "whether he is not an alien; and if not, when and where he was born, and who were his parents, and where they were respectively born, and whether as an alien he is not incapacitated from being a director of the company in the bill mentioned;" and the cause of demurrer shewn is that "the answering such part of the said bill might subject the Defendant to pain, penalty, or forfeiture." Whether that allegation is right in point of law, is for the present purpose immaterial. The Vice-Chancellor's decision proceeded on the ground that a Defendant against whom an attachment has been sued out, is in contempt; that every demurrer is a dilatory, and that no party who is in contempt is entitled to put in a dilatory. These propositions are not borne out by the authorities, or founded on principle. In a note to the

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case of *Curzon v. De la Zouch*, Mr. Swanston (a) has traced to one of Lord Clarendon's orders (b) the origin of the rule, that a Defendant against whom an attachment has issued cannot file a demurrer. By that order it is provided, that after a contempt duly prosecuted to an attachment with proclamation returned, no commission to answer shall be made, nor any plea or demurrer admitted, but upon motion in Court and affidavit: and the rule is laid down precisely in the same way in the *Practical Register* (c), and by Chief Baron Gilbert in his *Forum Romanum* (d). And the foundation of the rule is thus stated in the latter work—"The reason why upon the first contempt on the attachment, they allow a commission to issue, or a plea or demurrer to be put in, is because it don't appear to be an affected delay; and therefore, upon tendering the costs of the attachment the Defendant may take his commission; and upon like tender, the plea and demurrer are to be received. But if there regularly issues an attachment with proclamation, the Defendant cannot of course purge his contempt by a mere tender; but he must apply to the Court to shew that his plea and demurrer are proper, and to exhibit a proper excuse for his delay;" &c. The attachment, therefore which creates such a contempt as deprives the party of the privilege, must have advanced to its second stage; it must be an attachment which issues after a return of *non est inventus* has been made to the first. That is not the Defendant's case; and to him therefore the rule would not apply. No case can be found in which this distinction has been taken and over-ruled. Even in *Curzon v. De la Zouch* (e) it does not seem to have been adverted to.

Besides,

(a) 1 *Swanst.* 193.

(d) p. 71.

(b) *Beam. Ord.* 178.(e) 1 *Swanst.* 185.(c) p. 114. *Wyatt's ed.*

Besides, in all the former cases the demurrer filed appears to have gone to the relief, except in *Curzon v. De la Zouch*, where the nature of the demurrer does not appear: here the demurrer is merely to a single question, for an answer to which the Defendant is advised that the Plaintiff has no right to call. The Vice-Chancellor's decision assumed, what is extremely questionable, that this demurrer was a dilatory. Certainly it is not in its character such a proceeding as to delay the answer, and therefore to fall within the definition of a dilatory given in *Rowley v. Eccles (a)*, where it was ruled that a Defendant is only once permitted to delay his answer by plea or demurrer. A plea in bar is not a dilatory, because, when it comes to be tried, it decides the right. A dilatory is a defence upon which the decision does not finally dispose of the question between the parties; and that agrees with the definition of Serjt. *Stephen* in his treatise on pleading, where he distinguishes between dilatory and peremptory pleas. This is merely a short and easy mode of settling the point, how far the Defendant is bound to answer a particular interrogatory not relating to the merits of the case, instead of letting the answer be excepted to, and then going before the Master on a reference and, eventually having the report reviewed upon exceptions, — a course which requires three distinct proceedings instead of one. When a Defendant is served with a *subpoena*, all the modes of defence are open to him — by demurrer, by plea, and by answer. If an attachment has been sued out and returned with proclamation, then, according to Lord *Clarendon's* rule, he is precluded from demurring upon the merits; but that is no reason why he should not be permitted, instead of insisting upon his objection

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(a) 1 Sim. & Stu. 511.

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objection by his answer, to raise and have the point decided by a demurrer; which, as it does not involve the merits, or delay the progress of the cause, cannot in strictness be termed a dilatory.

Mr. *Wakefield* and Mr. *Rogers*, *contra*, were not called upon by the Court.

The LORD CHANCELLOR.

No such limit to the rule as has now been suggested with respect to the stage of the attachment, is laid down by Lord *Eldon* in *Curzon v. De la Zouch*. The difficulty I should feel in allowing the distinction arising out of the alleged nature of the demurrer is this: that it would impose upon the Court the necessity, in each particular case, of going carefully through the pleadings, for the purpose of determining how far it applied to merits, and how far to discovery merely; a course which, practically, would be attended with extreme inconvenience. If the rule were once admitted, that a party who was under an attachment for not answering might file an answer and demurrer, provided the demurrer did not go to the relief, he might, on that pretence, demur to every question but one in the bill, and then call upon the Court upon the demurrer to adjudicate on the whole case. The document which the Defendant has filed is entitled "an answer and demurrer." It was open to him to take the opinion of the Court, with respect to the interrogatories objected to, by way of demurrer, before he was under an attachment, and whether they were more or less extensive; but having neglected to avail himself of that opportunity, he is not now entitled to complain of that as a hardship which is the consequence of his

own

own default. I consider myself bound by the authorities, and especially by the judgment of Lord *Eldon* in *Curzon v. De la Zouch*; and the motion must be dismissed with costs.

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Lord
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IN the month of *December* 1831, *Charles Robert Elliston*, the son of *Robert William Elliston* then lately deceased, was possessed of a lease of the building and premises called the *Surrey Theatre*, situate in the *Blackfriars Road*, in the county of *Surrey*, under a lease for a term of which two years and four months or thereabouts were then unexpired; and *Charles Robert Elliston* was then also absolutely possessed of certain scenery and dresses used in and about the theatre; and he was desirous of selling his interest in the lease, and in the scenery and dresses.

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May 6. 9. 27.
June 1. 4.

1837.
Jan. 18.

No play can lawfully be acted for hire, gain, or reward, within twenty miles of *London*, without the authority of letters patent from the King, or of a licence from the Lord Chamberlain; and no such letters patent or licence can be granted so as to authorise the performance of plays at any place, except within the city or liberties of *Westminster*, or where the King may happen to reside.

In the beginning of the month of *December*, 1831, the Defendant, *David Webster Osbaldiston*, who had for some time acted as the manager of the theatre on behalf of the former lessee *R. W. Elliston*, entered into a treaty with *Charles Robert Elliston* for the purchase of the lease and scenery and dresses; and he was anxious to form a partnership with some person possessing capital, who should join him in the purchase of the lease and the other articles,

An agreement, therefore, for a partnership in acting plays at a theatre situate within twenty miles of *London*, but not within the city or liberties of *Westminster*, or in the place of the King's residence, is one to which the Court will not give effect.

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cles, and in carrying on public performances at the theatre; and having expressed such his desire to *William Shanks Williams*, who had previously to that time been one of the performers at the *Surrey Theatre*, and who was a common friend of his own and of the Plaintiff's, *Mr. Williams*, on the 3d of *December* 1831, by the desire of the Defendant, wrote to the Plaintiff, *William Ewing*, who resided in *Edinburgh*, a letter in the following terms: —

“ At *Mr. Elliston's* death you wrote to me, expressing a wish to have some share in the *Surrey Theatre*, in the event of the concern being to let. Now, *Mr. Osbaldiston*, our acting manager, who is a very old friend of mine, in conversation some time ago, I told him I had a friend who wished to have a share in the *Surrey Theatre*. This day I renewed the subject on your account, finding he has the refusal of the theatre, and on terms which, I think, with the renewal of the lease, (of which there can be little doubt) a great property may be realised. *Mr. O.* informs me *Elliston* wants 3000*l.* for all the property, lease, and good will. Now there is a clause in the lease, by which the landlord is bound to return 700*l.* at its expiration, deducting 10*l.* per cent. for the use of certain property in the theatre which belongs to the landlord. Now *Mr. O.* reckons, and I think under the mark, the remainder of the property, including scenery, dresses, &c., to be worth 800*l.*, leaving the good will of the theatre at 1500*l.*; making together 3000*l.* *Mr. O.* will put down 750*l.*, his share of the purchase, yourself also putting down the same amount, provided you can advance 1500*l.* for the good will, his share of which he would make up in a certain time as may be agreed upon, allowing you 5*l.* per cent. interest until the same is paid. This is the outline of his proposal and conversation with me; and I will give you my free opinion on the subject. If you can conveniently spare the money, I feel convinced you could not dispose of it to greater advantage. Look what *Elliston* has realized

ized by it, and entered upon it without a shilling, and when the theatre was sunk in reputation. At present it stands in that respect next to the *Adelphi*, and I firmly believe no man in *London* could make the *Surrey Theatre* answer better than Mr. O.; no one stands higher in popular opinion. He is a gentleman, has talent, indefatigable attention and industry, and a good city connection. I need hardly press upon you the necessity of an answer by return of post, as the thing must be instantly settled, on account of making engagements for the ensuing year."

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To this letter the Plaintiff, on the 5th of *December*, replied as follows: — "I am certainly desirous of adopting some respectable and prudent means of improving my income, which has suffered materially of late years from some untoward speculations and investments. I also feel assured, that as a man of honourable principles, and my sincere friend, you would recommend nothing to me in that view, but what you had solid grounds for considering eligible and beneficial. At the same time, it is a matter of vast importance for me to embark in, especially in such critical times. It will, therefore, at all events, be impossible for me to decide upon it instantly, as you call on me to do in your letter. I will not only require a reasonable time to consult and discuss the matter with my friends, but it is absolutely necessary that I should be possessed of more particular information, in order to afford me some specific data for forming an opinion and coming to a conclusion. For instance, what is the rent; the duration of the lease; will it be renewed without a fine or increase of rent, and for what period; what were the profits for the last three years? It would not be convenient for me to advance the large sum you state before disposing of my pictures, or at any rate before the first of *February* or *March*

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next. I believe Mr. *Osbaldiston* to be a highly respectable character; in short, all that you represent him to be; which affords a strong temptation and inducement to me to form such a connection; but why not take a third share yourself? When I receive the above information, and if a reasonable time can be given to decide upon it, I would come to town to arrange and complete the transaction. Don't you consider 3000*l.* too much for a lease which is nearly terminated? What does Mr. *Elliston* mean by the good will of the theatre?"

On the 7th of *December*, 1831, the Plaintiff wrote to the Defendant himself, and referred to the letter which he (the Plaintiff) had already addressed to Mr. *Williams*, and made various suggestions to the Defendant, as to points to be attended to in his treaty for the purchase of the lease of the theatre. The Defendant, on the 10th of *December*, having received the Plaintiff's letter to him, and having seen the letter which the Plaintiff had addressed to Mr. *Williams*, wrote to the Plaintiff in the following terms:—"I am in receipt of yours of the 7th instant. Mr. *Williams* also yesterday heard from you, with which letter he made me acquainted, and I believe his answer would signify that I had at length arranged the business for opening the theatre on the 26th. Now this arrangement, as I signified to him, will not, as the matter has been named to you, preclude your entering into the concern, should you feel so disposed; but I need hardly add, it must be done *instantly*; and though I have arranged my money matters so that all may be quite right, still a partner coming in with ready money would relieve me from much anxiety. I will state to you full particulars. I give for the lease and all the property of the theatre 3000*l.*, to be thus paid; 1500*l.* down, bill at two months for

for 500*l.*, and 20*l.* per week till all is paid, including 200*l.* at *Whitsuntide*, as expediting the 20*l.* per week, not exclusive of that, of course; making altogether 3000*l.* Now there is 700*l.* in the lease, and the other property of the theatre is insured at 2000*l.*; say its worth, 1500*l.*; so that it leaves the good will at 800*l.*; and I feel certain in my own mind of a renewal of the lease, but will not shew the least anxiety about it, for fear they on that account want to raise the rent hereafter. Now my weekly expenses up to *Easter*, in consequence of engagements that don't fall out till then, and which I would not renew, are rather under 200*l.* weekly; after *Easter*, 187*l.* Our first eight weeks' receipts last year were 510*l.* 10*s.*, 321*l.* 2*s.* 6*d.*, 269*l.*, 274*l.* 15*s.* 6*d.*, 278*l.* 2*s.*, 196*l.* 7*s.*, 256*l.* 2*s.* 6*d.*, 290*l.* — 2395*l.* 19*s.* 6*d.*; eight weeks' expenses at 200*l.*, 1600*l.*; profit 795*l.* 19*s.* 6*d.* This, of course, is one of the best parts of the year, though not including *Easter* or *Whitsun* holidays, or the benefits. Now the present is the very worst time of the year, and our last six weeks' receipts are 202*l.* 2*s.*, 190*l.*, 208*l.* 14*l.*, 193*l.*, 197*l.* 7*s.* 6*d.*, 188*l.* 17*s.* — 1180*l.* 6*s.* 6*d.*; six weeks' expenses at 187*l.* per week 1122*l.*; profit at worst time 58*l.* After this full explanation, it only remains for me to say that should you feel disposed to join me in the concern, these are the terms (excuse brevity of expression as I am pressed for time): I will put down 1000*l.*; you the same. I will have the engaging of all the actors and servants up to 3*l.* per week; above that sum your sanction must be obtained; discharge all actors as I may think expedient; accept all pieces under the value of 20*l.*; cast all the pieces, &c.; and bind myself down also not to expend more than 200*l.* per week (without your sanction), including rent, taxes, salaries, wardrobe, painting, &c.; that my salary as actor and manager shall be 8*l.* per week; and that I shall take two benefits a year, on any *Monday* not a holiday

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a holiday or public time, at 50*l.* charges, you having the privilege to do the same. Now I bind myself to this promise, as a man of honour, until the return of post, at which time I am free either to accept or refuse your proposals. I also pledge myself to the correctness of the above statements, as also to produce my 1000*l.*, which, with yours, should you join me, I should wish to be placed in our banker's hands by the 20th of this month at the latest. That neither party take more than a limited sum out of the concern. You will have, of course, all access to the books, &c. In the lease, 700*l.* is to be returned by the landlord, at its termination, for money paid by Mr. *Elliston* for fixtures, machinery, some scenery, &c., deducting 10*l.* per cent. for its use. I saw my attorney this morning; he says there is some informality in the lease respecting this 700*l.*; but whatever error there may chance to be, it is to be settled by arbitration. I give the 3000*l.* under the impression that I receive at the end of the lease 700*l.*; should this not be so, an allowance in the terms must be made to that effect."

The Plaintiff's reply was dated the 14th of *December*, and was in part as follows:—"I beg to state that I agree to join you on the terms you mention; it being of course understood that it must be for a period of at least ten years' duration, and that I have liberty to draw out a sum not exceeding 10*l.* weekly for my own use. A distinct and explicit contract of partnership or indenture will require to be executed at an early opportunity, where every thing essential must be clearly stated, without ambiguity, in order to prevent any misunderstanding or chance of dispute (which constantly prove the bane and ruin of theatrical concerns). I cannot, however, put down the 1000*l.* earlier than the 1st of *January*, or perhaps a month."

The

The Defendant on the 17th of *December* wrote to the Plaintiff in the following terms : —

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“Yours of the 14th is before me. I pledged my word, and I redeem it. When I first addressed you I felt all the timidity of a man first embarking in money matters; and though I did not doubt my ultimate capability of fulfilment of my agreements, still I thought a partner with money would relieve me from all anxiety. I yesterday so far settled my arrangements as to make my mind quite easy on the subject; but still I accept your offer with much satisfaction. I have made money matters this morning a little more easy, and am in hopes of getting a reduction of the purchase money.

“Whatever advantage I reap by any after agreement, you will of course be participator. The stipulations I named in my last letter will be for the advancement of the interests of the concern; and in drawing up any articles of partnership between us, should there be any one point that might admit of the slightest argument between us, I consent to leave it to the entire decision of our mutual friend *Williams*. Your note of 500*l.* I should be glad that you should send by return of post, which, with 500*l.* I intend paying on *Tuesday* or *Wednesday*, will satisfy Mr. *Elliston*, until after the opening of the theatre. You say for a period of ten years' partnership; to which I can have no objection; and add, to have a liberty of drawing out a sum not exceeding 10*l.* weekly. I presume you mean that I should have equal right to do the same, in addition to the salary I may receive as actor, &c. I must plead haste for this scrawl, and in conclusion, and on terms similar to those named in my last letter, hold myself hereafter in equal partnership in the

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Surrey Theatre, in all its interests and emoluments, with yourself. My motive in reserving to myself the engaging of actors is solely with a view, from my own experience, of benefiting the concern. The broad basis of my management will be, to economise, but not to starve the establishment, to be as careful of 1*l.* as of 100*l.*, and not to engage more performers or servants than are absolutely necessary."

On the 19th of *December*, the Plaintiff addressed a letter to the Defendant, which contained the following passages: "I am favoured with your esteemed epistle of the 17th inst., and I most cordially agree with every sentiment contained in your letter. I confess, however, that I have been greatly damped on reading, in the interim, the decision in the case of poor *Chapman*, and the comments in the *Sunday Times* on Lord *Tenterden's* exposition of the law on that occasion. I request you will favour me with your candid sentiments on the subject. Pray what do you open with? Who do you think of for our banker? and in what manner or name do you propose to lodge the receipts of the house? Have the goodness to transmit to me every *Monday*, post paid, a note of the receipts of the preceding week; the clerk or book-keeper can do it on the *Sunday*. I beg leave to enclose my promissory note to you at three months date, payable at *Coutts* and Co.'s, for 500*l.*, which please acknowledge."

A few days afterwards, the Plaintiff wrote again to the Defendant, as follows: "I wrote you last *Monday* enclosing my promissory note to you for 500*l.*, payable at three months date at *Coutts* and Co.'s. Though there have been numerous thefts committed lately, as I observe, by letter-sorters, at your General Post Office, yet

yet I hope you received the above last *Thursday*. An acknowledgment of it, however, was due by this day's post; but I have not had the pleasure of hearing from you. I fear our views and hopes are quite frustrated regarding the *Surrey Theatre*, which like other minors, as they are termed, must, I doubt, be shut up, at least until some mitigation of the law is obtained, or the Lord Chamberlain's licence. I have seen the copy of the letter addressed to you and others by the solicitors of the theatres of *Covent Garden* and *Drury Lane*, and the notice of the meeting to be held this day in *Russell Street*."—"P.S. I shall be astonished if the case of *Chapman* is not appealed to the Lord Chancellor. Are Lord *Tenterden's* doctrines considered quite sound? Our friend Mr. *Williams* seemed to think that Mr. *Elleston* held *Drury Lane* and *Covent Garden* at defiance, from some flaw in the patents, or that one or both of them had been lost, or could not be made forthcoming."

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On the 23d of *December*, the Defendant wrote a letter to the Plaintiff, which contained the following passages:

"Yours of yesterday, with the note 500*l.*, was duly received, and I consider we are in honour truly partners in the *Surrey Theatre*."

"We open with a new drama called *The Sorcerer*, or *The Two Brothers of Catonia*; *Cinderella*; and a new pantomime called *Old King Cole*, or *Harlequin and his Fiddlers Three*. Don't alarm yourself about any notices from the patent theatres; I have the best authority for stating they will not annoy us, if we don't play their pieces called the regular drama, which I had before resolved not to do. I shall be anxious to see you in town; till then I will weekly give you all the necessary information.

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ation. I feel quite sanguine; all congratulate me in having the theatre, and all prophesy future good."

On the 4th of *January*, 1832, the Defendant wrote as follows to the Plaintiff: "Yours of the 31st is before me, and to which I should have replied yesterday but for the meeting which took place, when a petition was drawn up to present to parliament, whereby we shall, without a shadow of doubt, be relieved from the acts now in existence, and be well assured of the ground on which we stand." — And on the 6th of *January*, 1832, the Plaintiff replied as follows: "I shall be with you as early as I can, and at all events by the 1st of next month. In the meantime I wish your solicitor to make a draft or sketch of our articles of copartnery, in order that my solicitor may consider and revise them in the interim. I presume you have a correct inventory of the scenery, dresses, and other articles purchased from Mr. *Elliston*, or belonging to the concern. A single sheet of folio uncut letter paper may contain this, and pay only single postage."

The Defendant wrote to the Plaintiff on the 19th of *January* a letter containing the following passages: "I hoped yesterday to have sent you a copy of the partnership as you wished, but have not been able yet to get it from my solicitor. A day or two, I hope, will complete it: it is founded on the observations I made you in a former letter, and I am convinced will be for the good of the concern: there will be some additional clause in case of the death of either party, or a non-renewal of the lease, &c. &c. I have boldly waged war with the majors, as you will see by the enclosed bill. We played *Othello*, *Monday* and *Tuesday*, to 77*l.* 2*s.* and 58*l.* The town is on my side, and the march of intellect and reform

reform has progressed too far to be stopped by the aristocratic hand of monopoly." "Thus you will perceive all goes on well. I have four new pieces on the stocks, two of which I expect will be great hits. I have made up my mind (and the world seems to back me) the theatre shall succeed. I am now the talk of all *London*; and should the patents bring an action against me, I can defend it by public subscription."

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The Plaintiff's reply was dated the 23d of *January*, 1832, and, omitting an immaterial passage, was as follows:—"I am favoured with yours of the 19th inst., and am most happy to see such proofs of the strength and talent of the *Surrey* theatrical company. The performance of *Othello* undoubtedly appears to be a bold measure, when we consider it is at the risk of paying 50*l.* of penalty for every time it is acted; but I feel confident that you would never be so imprudent as to commit yourself in so serious a matter, without being secure of public support and consequent impunity, in the event of a prosecution. ('A plague on both their houses!') I think you could fairly beat them in their own professed ground and vocation, the regular drama, and in the highest department too of the art, viz. tragedy; *Julius Cæsar* for instance; or drive *Kemble* out of the field in *Henry the Eighth*.—Something that will hit, like *Black-eyed Susan*, is worth *Shakspeare* and *Otway* together. You say there is 1000*l.* to pay on the 19th of *February* prox. Now I shall be prepared, of course, to retire my note for 500*l.* remitted to you 19th of *December*, and payable 22d of *March*. Will you require my remaining 500*l.* before the 29th *February*? Be so good as to let me know, with a note of the receipts since *Wednesday* se'nnight. I look for the draft of the articles of partnership every post."

On

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On the 26th of *December*, 1831, the Defendant commenced the exhibition of dramatic performances at the *Surrey Theatre*, and thenceforward continued such exhibitions. The proceeds of the Plaintiff's promissory note for 500*l.* were received by the Defendant, and applied in part payment for the lease of the theatre, and the other articles purchased by him of *C. R. Elliston*.

On the 7th of *February* 1832, the Plaintiff remitted to the Defendant the sum of 300*l.*, and, on the following day, the sum of 200*l.*; making, together with the 500*l.* before sent, the sum of 1000*l.* The Defendant, for some time, transmitted to the Plaintiff accounts of the receipt and expenditure of the theatre; and in or about the month of *April* 1832, the Defendant paid to the Plaintiff the sum of 150*l.*, as being an allowance of 10*l.* per week for 15 weeks, up to the 7th of *April* 1832. On or about the last-mentioned day, the Plaintiff came to *London*. No articles of partnership had then been executed between the Plaintiff and the Defendant, and the stipulations to be contained in such articles soon afterwards formed the subject of much angry discussion between the Plaintiff and the Defendant; and in the result, the Plaintiff and Defendant came to no understanding with respect to the articles. The Plaintiff's solicitor inserted, in the draft of the articles which had been prepared by the Defendant's solicitor, a stipulation that, without the mutual consent of both partners, no play or theatrical performance should be represented, which should or might interfere, or be construed to interfere with the two patent theatres of *Covent Garden* and *Drury Lane*, or that might tend to any legal conflict with them, or subject the parties or either of them to penalties, or endanger their licence or licences in any manner howsoever.

Opposite

Opposite to this proposed clause the Defendant's solicitor wrote, in the margin of the draft, the following words: "Wholly inadmissible; see 10 G. 2. c. 28."

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While these discussions with respect to the terms of the articles of copartnership were in progress, viz. in the month of *July* 1832, the Defendant procured an assignment of the existing lease to be made to himself alone; and he also entered into a negotiation with the owner of the reversion, for the grant of a new lease of the theatre. The Defendant never paid to the Plaintiff any share of the profits of the theatre, except the sum of 150*l.* before mentioned.

The bill, which was filed on the 9th of *July* 1833, prayed, that it might be declared that the Plaintiff and the Defendant were then, and had been since the 10th of *December* 1831, partners in the *Surrey* theatre, and the lease thereof, and all renewals of such lease effected during the term of ten years from the commencement of such partnership, and in the profits arising from the performances at the theatre, according to the agreement for such partnership contained in the three letters of the 10th, 14th, and 17th of *December* 1831; and that the Defendant might be decreed to abide by and perform that agreement, the Plaintiff being ready and willing to perform the same on his part; and that it might be referred to the Master to approve of proper articles of partnership to be executed by the Defendant and the Plaintiff, pursuant to the terms of the three letters and the agreement therein contained. And that the Defendant might be decreed to admit the Plaintiff to the full benefit of the partnership, and to an equal share in the profits thereof; and that he might be decreed to execute a proper assignment or declaration of trust of the lease of the

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theatre, and the renewal thereof; or to take, or concur in taking, all proper steps for the renewal of the lease for the benefit of the co-partnership. And that it might be declared that the Defendant had acted fraudulently and improperly in the management of the theatre, and of the affairs of the partnership; and that he might be removed from such management, by the order of the Court; and that some proper person or persons might be appointed to manage the same: and that proper directions might be given for keeping the accounts and managing the cash transactions of the partnership, for the equal benefit of the Plaintiff and the Defendant. And in case it should appear that the partnership ought to be dissolved, then that the same might be dissolved, and the affairs thereof wound up under the directions of the Court; and that the lease, or any renewal thereof which had been or could be obtained, might, together with the other stock and effects of the partnership, be sold; and that an account might be taken of all the dealings and transactions of the partnership; and that, in taking such account, the Defendant might be charged with all the sums, beyond the sum of 200*l.* a week, expended by him in the management of the theatre, including rent, taxes, salaries, wardrobe, painting, and other expences; and that he might also be decreed to account for all sums of money received in respect of the theatre, including the profits of the saloon, private boxes, play-bills, and other sources of income to the concern; and that, in taking the account, regard might be had to the terms of the agreement for the partnership contained in the three letters. And that the Defendant might be decreed to pay what should be found due from him on taking such accounts; and that in the meantime the Defendant might be restrained from managing, and interfering in the management of the theatre, and the

the affairs of the partnership, and from receiving, by himself or his agents, the income or profits arising from the theatre; and that it might be referred to the Master to approve of a proper person or persons to manage the theatre, and to receive the income and profits arising therefrom.

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The Defendant, by his answer, relied on the 2d & 5th sections of the act 10 G 2. c. 28. (a), as shewing that

(a) By the act 10 G. 2. c. 28. s. 1. it was enacted, that after the 24th of June 1737, every person who should, for hire, gain, or reward, act, represent, or perform; or cause to be acted, represented, or performed, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, in case such person should not have any legal settlement in the place where the same should be acted, represented, or performed, without authority by virtue of letters patent from his Majesty, or without licence from the Lord Chamberlain of his Majesty's Household for the time being, should be deemed a rogue and vagabond, within the intent and meaning of the act, 12 Anne, stat. 2. c. 25.

By the second section it was enacted, that if any person, having or not having a legal settlement as aforesaid, should without such authority or licence as aforesaid, act, represent, or perform, or cause to be acted, represented, or performed, for hire, gain, or reward, any interlude,

tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, every such person should, for every such offence, forfeit the sum of 50*l.*; and in case the said sum of 50*l.* should be paid, levied, or recovered, such offender should not for the same offence suffer any of the pains or penalties inflicted by the recited act of 12 Anne, st. 2. c. 23.

The fifth section provided that no person or persons should be authorised, by virtue of any letters patent from his Majesty or by the licence of the Lord Chamberlain, to act, represent, or perform, for hire, gain, or reward, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, in any part of Great Britain, except in the city of Westminster and within the liberties thereof, and in such places where his Majesty, his heirs or successors should in their royal persons reside, and during such residence only; any thing in that act contained to the contrary notwithstanding.

The sixth section declared in what

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that the performances which it had been contemplated by the Plaintiff and Defendant to exhibit at the *Surrey* theatre were such as could not be legally exhibited there; and that, therefore, the alleged contract of partnership

what manner the pecuniary penalties should be recovered, and that such penalties should be divided equally between the informer and the poor of the parish in which the offence should be committed; and the eighth section provided, that no person should be liable to be prosecuted for any offence against the act, unless such prosecution should be commenced within six calendar months after the offence committed.

By the act 25 G. 2. c. 56. (made perpetual by the act 28 G. 2. c. 19.) it was enacted in s. 2. that after the 1st of Dec. 1752, any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of *London* and *Westminster*, or within twenty miles thereof, without a licence had for that purpose, from the last preceding *Michaelmas* quarter sessions of the peace to be holden for the county, city, riding, liberty, or division in which such house, room, garden, or other place was situate (who were thereby authorised and empowered to grant such licences as they in their discretion should think proper,) signified under the hands and seals of four or more of the justices there assembled, should be

deemed a disorderly house or place. The section then went on to provide, that all persons found in such unlicensed places might be seized, to be dealt with according to law, and that every person keeping such unlicensed place should forfeit 100*l.* and be otherwise punishable as the law directed in cases of disorderly houses.

The fourth section provided, that nothing in the act contained should extend to the Theatres Royal in *Drury Lane* and *Covent Garden*, or *The King's Theatre*, in the *Haymarket*, nor to such performances and public entertainments as were or should be lawfully exercised and carried on under or by virtue of letters patents, or licence of the Crown, or the licence of the Lord Chamberlain of his Majesty's household; any thing therein contained notwithstanding.

By the act 28 G. 3. c. 50. s. 1. it was enacted, that it should be lawful for the justices of the peace of any county, riding, or liberty, in general or quarter sessions assembled, at their discretion, to grant a licence to any person or persons, making application for the same by petition, for the performance of such tragedies, comedies, interludes, operas, plays, or farces, as then were

nership was entered into for illegal purposes, and was consequently void.

The Defendant also stated, by his answer, that he did on the 26th of *December* 1831 commence the exhibition of theatrical performances in the *Surrey* theatre, and that such performances consisted exclusively of interludes, tragedies,

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were or thereafter should be acted, performed, or represented at either of the patent or licensed theatres in the city of *Westminster*, or as should, in the manner prescribed by law, have been submitted to the inspection of the Lord Chamberlain of the King's Household for the time being, at any place within their jurisdictions, or within any city, town, or place situate within the limits of the same, for any number of days not exceeding sixty days, to commence within the then next six months, and to be within the space of such four months as should be specified in the said licence, so as there be only one licence in use at the same time within the jurisdiction so given, and so as such place be not within twenty miles of the cities of *London*, *Westminster*, or *Edinburgh*, or eight miles of any patent or licensed theatre, or ten miles of the residence of his Majesty, or of any place within the same jurisdiction, at which, within six months preceding, a licence under that act should have been had and exercised, or within fourteen miles of either of the Universities of *Oxford* and *Cambridge*, or within two

miles of the outward limits of any city, town, or place having peculiar jurisdiction; and so as no such licence under that act should have been had and exercised at the same place, within eight months then next preceding; any law or statute for the punishment of persons employed in theatrical representations to the contrary in anywise notwithstanding.

The second section made it essential to the validity of any such licence, for a place having peculiar jurisdiction, that the majority of the justices for that jurisdiction should concur.

By the act 5 G. 4. c. 83. s. 1. it was enacted, that all provisions theretofore made, relative to idle and disorderly persons, rogues, and vagabonds, incorrigible rogues, or other vagrants, in *England*, should be repealed, excepting as to any offence committed before the passing of that act, and save and except as thereinafter excepted. The exceptions referred to related only to the law in force for the removal of poor persons in certain cases, and to the law in force as to lunatic vagrants.

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tragedies, comedies, operas, plays, farces, and other entertainments of the stage.

The answer also stated, and it was proved in evidence, that the *Surrey* theatre was not situate in the city of *Westminster* or within the liberties thereof, but in *St. George's Fields*, in the parish of *St. George the Martyr*, in the borough of *Southwark*; and that since the accession of his present Majesty to the throne, his Majesty had never, at any time previously to or since the month of *December* 1831, resided, and that he did not at any time during the same month reside in, near to, or about the *Surrey* theatre, or the parish of *St. George the Martyr*, in the borough of *Southwark*. The answer further stated, and it was proved in evidence, that the *Surrey* theatre was situate within one mile, or thereabouts, of the city of *London*, and within the same distance, or thereabouts, of the city of *Westminster*, and within about one mile and a half of the patent theatres of *Drury Lane* and *Covent Garden*.

The Defendant, by his answer, further stated, that in or about the month of *April* 1832, he offered to return to the Plaintiff the sum of 1000*l.*, which he had advanced, with interest; and that he had frequently since repeated the same offer, but that it had always been declined by the Plaintiff: the Defendant also stated, that his proposals for a renewal of the lease had not been accepted by the owner of the reversion. The answer further stated, that after the disputes with respect to the terms of the articles of partnership had commenced, the Plaintiff refused to advance his share of the sums which were wanted to enable the Defendant to carry on the business of the theatre. This statement was supported by the evidence of one of the Defendant's witnesses.

Mr. *Tyas*, the Defendant's solicitor, stated in evidence, that the Plaintiff admitted to him that he had
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been, from the first, aware that the minor theatres were illegal, but that he felt confident that the law would not, and could not, be enforced against them. The same witness also proved that he had made the offers of returning the 1000*l.*, with interest, mentioned in the Defendant's answer.

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Tyas further deposed, that he had known the *Surrey* theatre for above twelve years; and that the business of the theatre consisted in theatrical representations, or the performance of stage entertainments; and, in particular, in the performance of interludes, tragedies, comedies, operas, plays, and farces: that money had been always, during the period for which the witness had known the theatre, taken at the door, for the admission of persons to view such stage entertainments; and that the profits of the theatre arose from the receipt of such monies. This evidence was corroborated by that of a witness, named *Fairbrother*, who was the treasurer of the theatre from the year 1828 to the year 1834.

It was also proved in evidence, and was admitted by the Plaintiff's counsel, that although the theatre had always been licensed in pursuance of the act of 25 G. 2. c. 36., for music and dancing, and other entertainments of the like kind, yet it had no other licence under any act of parliament, and no letters patent from the Crown, or licence from the Lord Chamberlain.

The Vice-Chancellor, at the hearing of the cause, dismissed the bill with costs; and the Plaintiff now appealed from his Honor's decree.

Sir *William Horne* and Mr. *Stuart*, in support of the appeal.

The ground upon which the Defendant relied in the Court below was, that the subject-matter of the partner-

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ship was illegal. But the Defendant must shew that the intention of the parties was illegal. The Plaintiff is a native of *Scotland*, and domiciled there, and was residing in *Edinburgh* at the time at which the contract was entered into. The correspondence contained an agreement or undertaking, on the part of the Defendant, that proper licences should be taken out to make the performances lawful. This was founded upon the admission that the lease contained a covenant to that effect. It is quite clear that the Plaintiff meant no infringement of the law: he wished for a prudent and honourable means of employing his capital. He cannot be supposed to have known the *English* law very accurately; he was not bound to know it; it is clear, from the expressions in several of his letters, that he was ignorant of it: he was quite unaware of any illegality in any of the performances which were likely to be exhibited at the *Surrey* theatre. It is impossible to say, that the three letters, which contain the agreement, constitute an agreement to do any thing that is illegal. If this partnership is illegal, any agreement for any partnership in the *Surrey* theatre, or, indeed, in any theatre, must be illegal also. The allusion to *Chapman's Case*, and its probable consequences, made by the Plaintiff in his letter of the 19th of *December*, and his suggestion of an appeal from Lord *Tenterden's* decision to the Lord Chancellor, shew that the Plaintiff contemplated nothing that was illegal, and shew also his ignorance of *English* law. The Defendant's answer to the Plaintiff then was, "Don't alarm yourself about *Chapman's Case*;" adding, that no danger of illegality was to be apprehended, if the Defendant did not exhibit the regular drama, "which he had before resolved not to do." The *Tottenham* theatre, which was the subject of *Chapman's Case*, had no licence of any kind; whereas this theatre has a licence, under the act of 25 G. 2. The only

only question, in that case was, whether the act 5 G. 4. c. 83. did not repeal the act 10 G. 2. c. 28., which was a mere *qui tam* act, enabling an informer to recover penalties incurred by exhibiting certain performances: and it does not follow from that case that the act 25 G. 2., and a licence granted under its authority, do not legalise such performances as were questioned in *Chapman's Case*. That case, therefore, did not touch the present question, and is no authority for it; and so the Plaintiff would have observed, if he had known the law when he wrote his letter of the 19th of *December*.

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It has never been decided that it is illegal to act large pieces in public: and even if any of the pieces, which appear to have been acted at the *Surrey* theatre, were pieces, for the exhibition of which penalties could have been enforced, the time allowed for that purpose has long since elapsed, and no act of parliament imposes any punishment for acting any pieces whatever, beyond the liability to a penalty. Before the Plaintiff's arrival in *London*, the Defendant had taken an assignment of the lease, and had, by so doing, bound himself to perform the covenant contained in the lease, that proper pieces only should be performed, and that proper licences for the performances should be obtained.

Nothing can be clearer than that any infringement of the law was the last thing contemplated by the Plaintiff, previously to his arrival in *London*; and when he did arrive in *London*, he caused a provision to be inserted in the draft of the articles of partnership to the effect that no play should be acted which would interfere with the rights of the patent theatres, or subject the parties to penalties. The observation made by the Defendant's solicitor, in the margin of the draft, with respect to
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this provision, is, "wholly inadmissible;" and he refers to the act 10 G. 2. c. 28.

The Defendant must prove that the performances which took place at the theatre were such as were prohibited by the act of 10 G. 2. and were not authorised by the licence granted under the act of 25 G. 2.; but this has not been established by evidence to be the case. Even if, however, in this theatre, which has been always open night after night, some one or two unauthorised performances did take place, would that circumstance vitiate the whole account between the Plaintiff and the Defendant? Where some of the purposes of a partnership are legal, and others not, the Court has never even said that the partnership is illegal altogether; and, indeed, the contrary has been decided, and is clearly the law; *Knowles v. Haughton (a)*, *Dover v. Opey (b)*. In order to resist altogether the Plaintiff's demand for an account, the Defendant must make out that every performance which took place during the period in question was illegal. Unless the agreement between the Plaintiff and Defendant could be proved to have been an agreement to exhibit illegal performances every night, it would be impossible to dismiss the Plaintiff's bill, by which he seeks an account of the manner in which his money has been employed. Suppose two persons were in partnership as grocers, and that one was the active and the other a dormant partner, and that in the course of the trade the active partner had dealt in certain contraband goods; would that entitle him to refuse any account to his co-partner? If so, a partner, who wishes to appropriate to himself the whole of the capital and stock of the partnership, may gain his object by merely dabbling in some illegal speculation. To justify the Defendant's

(a) 11 Ves. 168.

(b) 2 Eq. Ca. Ab. 7.

defendant's position, the alleged illegality must have been the illegality of the Plaintiff himself, and must have tainted the whole transaction: but so far from that being the case, the Plaintiff, residing in *Edinburgh*, has entrusted the management of the affair to the Defendant in *London*, who now says that the Plaintiff's money is to be converted into a gift to him, the Defendant, by means of his, the Defendant's, own misconduct. *Watts v. Brooks.* (a)

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The cases of *Rex v. Handy* (b), *Gallini v. Laborie* (c), *Parsons v. Chapman* (d), *Rex v. Neville* (e), and *De Begnis v. Armistead* (g), were cited before the Vice-Chancellor, to shew that the performances which have taken place at the *Surrey* theatre have been illegal; but they do not establish that position. In *Rex v. Neville*, the only question was, whether there had not been performances which contravened the act 10 G. 2. c. 28.; but the question here is, whether what has been done is illegal under the act 25 G. 2. *De Begnis v. Armistead*, only decides that no action can be maintained for money paid on an illegal agreement; and it is to be observed, that the Lord Chief Justice in that case said, that no doubt the illegality of the agreement was known to both parties; and it is clear that the necessity of a licence was well known to the Plaintiff. But where is an intention of any thing illegal to be found upon the face of the three letters, which constitute the partnership in the present case; or in what way does it appear that the Plaintiff afterwards sanctioned any such illegal intention?

Although this place is called a theatre, the Court cannot intend that any of the performances at it have been

(a) 5 Ves. 612.

(c) 1 B. & Adol. 489.

(b) 6 T. R. 288.

(g) 10 Bing. 107. and 3 Mo.

(e) 5 T. R. 242.

& Sc. 511.

(d) 5 Car. & P. 33.

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been illegal, unless that is proved by the most cogent evidence. In *Rodwell v. Redge* (a), Lord Tenterden said, "I shall presume the licence, from the fact that the performances went on;" and courts of equity have gone still further, in presuming that there has been no violation of the law. In *Levy v. Berry*, in the Exchequer, 30th February 1836, an injunction was granted as to a partnership in the royal *Victoria* theatre, formerly called the royal *Cobourg* theatre, to restrain certain parties from collecting or receiving the monies nightly taken at the theatre. It must be admitted, however, that no question of illegality was there raised. When the proposal, contained in the letters of Mr. *Williams* and the Defendant, was made to the Plaintiff, why was he to take it for granted that the partnership was to be considered illegal? If the Defendant has acted illegally, he must bear the consequences.

In *Thomson v. Thomson* (b), where both parties knew the contract to be illegal at the time at which they entered into it, Sir *W. Grant* said, that the defence of illegality, which was set up, was very dishonest; but what can be said of such a defence as that which the Defendant in this cause puts forward? And yet the Court below has, in the present case, not only refused relief to the Plaintiff, but has declared that he shall be compelled to pay the costs of asking for relief; this is more than was done in *Thomson v. Thomson*. It is quite evident that the Plaintiff placed implicit reliance upon the integrity of the Defendant; that he contemplated nothing like a partnership for illegal purposes, and warned the Defendant against any thing illegal; and indeed, the Plaintiff's first stipulation was, that nothing illegal should be done.

The

(a) 1 Car. & P. 220.

(b) 7 Ves. 470.

The Defendant first put in a general demurrer, upon the alleged ground that the bill sought an account of an illegal partnership: that demurrer was overruled by the Vice-Chancellor. The Defendant then answered, but insisted by his answer that he was not bound to produce the books of the theatre; assigning, as a reason for his refusal, that they would furnish materials for *qui tam* actions against him for exhibiting illegal performances. The Vice-Chancellor, however, ordered the production of the books (a), and his Honor's order was affirmed by Lord *Brougham*, upon appeal. There have, therefore, been two decisions in the Plaintiff's favour, upon the answer as it now stands; and the reasons for which the demurrer was overruled entitle the Plaintiff now to a decree.

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Mr. Knight, Mr. Beames, and Mr. Carpenter, for the Defendant.

It is quite clear, from the manner in which the Plaintiff states his case in the bill, from the correspondence, and from the evidence, that the performances which it was intended by the Plaintiff and Defendant to exhibit at the *Surrey* theatre, and which, in pursuance of that intention, they did exhibit, were such as had been prohibited and made unlawful by the act 10 G. 2. c. 28. The situation of the theatre renders it impossible that it ever could have a patent or licence which would authorise the performance of plays at it. The only ground upon which the Vice-Chancellor overruled the demurrer was, that it did not appear upon the face of the bill that the theatre was so situated.

The Plaintiff cannot have a specific performance of an agreement to do what was illegal, whether the Plaintiff did

(a) See 6 *Sim.* 609.

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did or did not know of its illegality when he made the contract; but, in fact, it is quite evident from the correspondence, and particularly from his allusion to *Parsons v. Chapman* (a), which he calls *Chapman's case*, that he did know the law when he entered into the alleged contract, for that contract was not completed until he wrote the letter of the 19th of December, in which he refers to that case. It is clear from *Parsons v. Chapman*, *Gallini v. Laborie* (b), *Res v. Glossop* (c), and *Res v. Neville* (d), that the prohibition contained in the second section of the act 10 G. 2. c. 28. is still in force throughout the kingdom. The cases of *De Begnis v. Armistead* (e), and *Otiley v. Brown* (g), shew that a contract founded upon an intention, or having reference to an intention, to do any thing, which is either expressly prohibited, or to which a penalty has been attached, cannot be enforced. *De Begnis v. Armistead* conclusively proves that such performances are to be considered as illegal, notwithstanding the time for suing for the penalties has elapsed.

As to the case of *Dover v. Opey* (h), very little attention can be paid to the reports of decisions contained in the 2d Volume of *Equity Cases Abridged*; and, indeed, no knowledge of the illegal intention was brought home to the Plaintiff in that case. The case of *Knowles v. Haughton* (i), which is reported *ex relatione*, appears, upon consulting the registrar's book (k), to have been the case of a bill filed for a share in the profits of a partner-

(a) 5 Car. & P. 35.

(b) 5 T. R. 242.

(c) 4 B. & Ald. 616.

(d) 1 B. & Adol. 489.

(e) 10 Bing. 107. and 3 Mo. 1008.

& Sc. 511.

(g) 1 Ba. & Be. 360.

(h) 2 Eq. Ca. Ab. 7.

(i) 11 Ves. 168.

(k) Reg. Lib. 1804. A. fol.

partnership in the businesses of brokers and underwriters. The Defendant insisted that a partnership in underwriting was illegal, and Sir *William Grant* dismissed the bill, so far as it related to the business of underwriters, but with distinct disapprobation of the case of *Watts v. Brooks*. (a) The Defendant, however, admitted that he was ready to account for the profits of the business of brokers, but denied the partnership, and insisted that the Plaintiff was only his clerk; and the only question in issue was the existence of the partnership as brokers: and Sir *W. Grant* thought that there was sufficient evidence of a partnership. It is clear, therefore, that that case has no application to the present. There was there no agreement for an illegal partnership; and the two businesses were perfectly distinct; for the bill prayed an account of the profits of the underwriting from one period, and of the brokerage from a different period. As, however, the present Plaintiff's money was, upon his own shewing, applied in the purchase of the lease for the express and sole object of effecting an illegal purpose, the present case falls directly within the principle of *De Begnis v. Armistead*.

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At the hearing before the Vice-Chancellor, the Defendant's counsel offered to return to the Plaintiff the amount which he had advanced. This offer, and the previous offers to the same effect mentioned in the answer, and the statements which the answer contains as to the Plaintiff's unwillingness to perform the contract on his part, put the Defendant quite right, in point of character and feeling, and formed the grounds upon which the Vice-Chancellor considered that the Plaintiff ought to pay all the costs.

Sir

(a) 3 Ves. 612.

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Sir *W. Horne* in reply.

As there has been no conviction for the exhibition of the performances in question, it cannot be said they were illegal. The lease which was purchased contained a covenant, on the part of the lessee, to do nothing to forfeit the existing licence, or any future licence to be granted for the theatre, and the assignment to the Defendant was made subject to the performance of that covenant. This shews, therefore, that nothing illegal was contemplated by the Plaintiff. The Defendant took the assignment as a trustee for both parties. No act of parliament imposes a forfeiture of the property of the theatre, in which any irregular performances may have taken place; and the Plaintiff cannot now be deprived of his share in this property. Even if the Court should think that some part of the contract is illegal, it is not so entire as to preclude the Court from giving the Plaintiff the benefit of some part of it. He is, at all events, entitled to have his money repaid to him with interest.

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The LORD CHANCELLOR.

The object of the bill in this case is to establish a partnership with the Defendant in the performances at the *Surrey* theatre, from the 10th of *December* 1831, and to have the accounts incident to such partnership taken; to have proper articles executed for the future; to remove the Defendant from the management of the theatre, and to appoint a manager in his place; or to have the partnership dissolved and the affairs of it wound up.

It appears that in *December* 1831, the late *Mr. Ellison's* son had the residue of a lease of the *Surrey* theatre to dispose of, of which rather more than two years were unexpired. The Defendant had negotiated

tiated for the purchase of the residue of this lease with the view of carrying on the business of the theatre; and, being desirous of procuring a partner in this adventure, he authorised a Mr. *Williams* to write to the Plaintiff, then in *Edinburgh*, a letter, dated the 3d of *December* 1831, as follows:—[His Lordship read the letter, and also the letters of the 5th, 7th, 10th, 14th, and 17th of *December* 1831.]

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These letters are by the bill treated as constituting the partnership.

It appears that upon the faith of this arrangement the Plaintiff transmitted to the Defendant a bill for 500*l.*; and the Defendant by a letter of the 23d of *December* 1831 acknowledged the receipt of it, and said “Yours of yesterday, with the note 500*l.*, was duly received, and I consider we are in honour truly partners in the *Surrey* theatre.”

Some other letters passed, not material to be observed upon; and the Plaintiff afterwards remitted two other sums of 300*l.* and 200*l.* to the Defendant.

The Defendant opened the theatre, and carried on the performances, and for some time treated the Plaintiff as a partner; and, in *April* 1832, paid him 150*l.* on account of profits.

In *April* 1832, the Plaintiff came to *London*; and quarrels soon ensued as to the provisions in detail to be inserted in the articles of partnership, and about the management of the theatre; during which the Defendant procured an assignment of the existing lease to be made to himself, and finally refused to recognise the Plaintiff as a partner.

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There are other letters most material to be adverted to, as they prove an important fact in the case; namely, that the Plaintiff, before he paid the first sum of 500*l.*, was fully informed of the nature of the speculation he was entering into, and that the performances which were to constitute the business of the partnership were unlawful. These letters are, first, the Plaintiff's of the 19th of *December*, remitting the 500*l.*; second, one from the Plaintiff a few days afterwards; third, the Defendant's answer, acknowledging the receipt of the 500*l.* (His Lordship then read those letters.)

The witnesses *Tyas* and *Fairbrother* prove that the performances at the *Surrey* theatre consisted of interludes, tragedies, comedies, operas, plays, and farces.

The theatre had not, and indeed could not have, any patent from the King, nor any licence from the Lord Chamberlain; but was regularly licensed by the magistrates, under the act 25 *G. 2. c. 36.*, for "public music and dancing, and other public entertainments of the like kind."

From this correspondence and this evidence it is clear, first, that the performances, as they had been carried on at the *Surrey* theatre, before the contract between the Plaintiff and the Defendant, and as they were intended to be carried on under that contract, consisted of all the ordinary descriptions of theatrical representations; secondly, that the Plaintiff knew this before he entered into the contract, or paid his money, and knew that such theatrical representations were contrary to law; and that the intention of both parties was to continue such representations.

Two questions only can be for consideration in this case. First, were these representations in fact contrary to law? Secondly, if they were, can the Plaintiff in this suit be entitled to any decree?

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The law upon this subject rests upon four acts of parliament, 10 G. 2. c. 28., 25 G. 2. c. 36., 28 G. 3. c. 30., 5 G. 4. c. 83. The 10 G. 2. c. 28., in sec. 1., enacts, That every person who shall for hire, gain, or reward, act, or cause to be acted, any tragedy, comedy, opera, play, farce, or any other entertainment of the stage, having no legal settlement in the place, without letters patent from the King, or a licence from the Lord Chamberlain, shall be deemed a rogue and vagabond. Section 2. enacts, That every such person, whether having a settlement or not, shall forfeit 50*l.* for each offence. Section 5. enacts, That no letters patent, or licence by the Lord Chamberlain, shall be granted to any person, except within the city of *Westminster*, or where the King shall reside.

The act 25 G. 2. c. 36. sec. 2., declares all places for public dancing or music, or other public entertainments of the like kind, in *London* and *Westminster*, or within twenty miles of them, disorderly, unless licensed at the sessions.

The act 28 G. 3. c. 30., authorises magistrates to license the performance of plays under certain restrictions, in places not within twenty miles of *London*, or eight of the patent theatres.

The act 5 G. 4. c. 83., repeals all former enactments as to rogues and vagabonds, and does not re-enact the above provision of the 10 G. 2. c. 28. s. 1.

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The result, therefore, is, that although the first section of the act 10 G. 2. c. 28., so far as it declares the persons therein described to be rogues and vagabonds, may be repealed by the 5 G. 4. c. 83., the sections 2. and 5. are not; so that there can be no letters patent, or licence from the Lord Chamberlain, under the act of 10 G. 2. c. 28., or licence from the sessions under the 28 G. 3. c. 30., for the performance of any kind of theatrical representation described in the act 10 G. 2. c. 28., within twenty miles of *London*, except in the city of *Westminster*, or in the place at which the King may be residing; in which places letters patent, or a Lord Chamberlain's licence, may be granted for that purpose.

The magistrates' licence under the act 25 G. 2. c. 36., which is the only licence the *Surrey* theatre had, being confined to dancing and music, and other public entertainments of the like kind, does not authorise any of the theatrical representations described in the act 10 G. 2. c. 28.

Such is the obvious result of these several enactments, and such is the construction which has been put upon them by several decided cases. In *Rex v. Glossop* (a), the conviction was for acting in *Surrey* without letters patent, or a licence from the Lord Chamberlain. In *Rex v. Neville* (b), it was expressly decided, that the prohibition in the second section of the act 10 G. 2. c. 28. was in force, and was universal. *De Begnis v. Armistead* (c), which I shall presently refer to for another purpose, also put this construction upon these statutes.

It

(a) 4 B. & Ald. 616.

(b) 1 B. & Adol. 489.

(c) 10 Bing. 107.

It is clear, therefore, that this contract of partnership was formed for the unlawful purpose of representing at the *Surrey* theatre prohibited performances. It was argued that, as there was a licence under the act 25 G. 2. c. 36., the theatre might have been used for lawful purposes, and that, to that extent, therefore, the partnership was legal. Now the lawful purpose would be confined to dancing and music, and other public entertainments of the like kind; but as to this, the contract between the parties is wholly silent, and the bill does not allege any intention of applying the theatre to any such purpose. The question is, not whether the premises might not have been used for a legal purpose, but whether the contract between the parties, and their partnership, and their intentions, were not altogether to use them for an illegal purpose: and undoubtedly such was the fact.

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Can this Court, under such circumstances, decree to one of the parties to this contract, the specific performance of the agreement, or any relief growing out of it? To do so would be inconsistent with all principle, and contrary to all the decided cases.

It was said that section 2. of the act 10 G. 2. c. 28. does not in terms prohibit such representations, but only imposes a penalty. The Chief Justice of the Common Pleas, in *De Begnis v. Armistead*, has answered this argument; founding his opinion upon the high authority of C. J. Holt, in *Bartlett v. Vinor* (a), and of Lord Ellenborough, in *Langton v. Hughes* (b). In *Bartlett v. Vinor*, Lord Holt says, "Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the

(a) See *Carth.* 252.

(b) See 1 *M. & S.* 598.

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the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute." In *Langton v. Hughes*, Lord *Ellenborough* says, "What is done in contravention of the provisions of an act of parliament cannot be made the subject-matter of an action." In *Gallini v. Laborie* (a) it was held, that no action could be maintained upon a contract to dance at a theatre not duly licensed. In *De Begnis v. Armistead* (b) it was decided that an action could not be maintained upon a bill, the consideration for which was the balance of an account between the Plaintiff and the Defendant, who had joined in representing operas at an unlicensed theatre. Several cases have been decided, upon the same principle, relating to transactions in illegal insurances; as *Mitchell v. Cockburne* (c). In *Knowles v. Haughton* (d) a bill, seeking to establish a partnership in under-writing, contrary to the statute, was dismissed.

Upon the same principle, in *Thomson v. Thomson* (e) Sir *W. Grant* dismissed a bill upon a contract, for the sale of the command of an *East India* ship; saying, "You cannot stir a step but through the illegal agreement, and it is impossible for the Court to enforce it." Again, in *Ottley v. Browne* (g), a bill by a banker for an account of certain other trading speculations, carried on for him in the name of the Defendant, was dismissed; bankers being, by an *Irish* statute, prohibited from engaging in any such business.

Against these authorities, the cases of *Dover v. Opey* (h) and *Watts v. Brooks* (i) were cited. In *Dover v. Opey*

(a) 5 T. R. 242.

(b) 10 Bing. 107.

(c) 2 H. Bl. 379.

(d) 11 Ves. 168.

(e) 7 Ves. 470.

(g) 1 Ball & B. 360.

(h) 2 Eq. Ca. Ab. 7.

(i) 3 Ves. 612.

v. *Opey* the partnership was for a perfectly legal purpose, and the Plaintiff was not party to any illegal transaction; but the Defendant attempted to withdraw certain adventures from the account, because he said they were contraband; in this, however, he was the sole actor; and the Court refused to permit him to take advantage of his own unfair dealing. In *Watts v. Brooks* it was held, that although the transaction was so illegal that the Court could not execute the contract, yet where the result formed an item in an account, the Court would give effect to such result. It is sufficient to say that this case has been disapproved of by Sir W. Grant in *Knowles v. Haughton*, and overruled by that case; and it was clearly contrary to the prior case of *Mitchell v. Cockburne*.

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It is, therefore, impossible that the Plaintiff can be entitled to any decree which shall be founded upon or growing out of this contract. But it was said, that some of the purposes were legal, such as the purchase of the lease and of other articles about the theatre, and that so far as the business of the partnership was lawful, the contract ought to be carried into effect, and *Knowles v. Haughton* was cited for that purpose; but, in that case, the business of brokers was entirely distinct from that of insurers, whereas, in the present case, every part of the joint transaction was auxiliary to, and in execution and furtherance of, the illegal object; besides which, the lease then existing has expired, and there is no evidence of any new lease having been granted, and the answer says that it has been refused.

In *De Begnis v. Armistead* the Plaintiff was not permitted to recover money actually paid, at the request of the Defendant, in furtherance of the illegal object, such as for the dresses and travelling expenses of the

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performers, though he was permitted to recover a sum of 30*l.* paid for the personal expenses of the Defendant.

It was then urged that the Plaintiff ought at least to recover the money he had advanced; and it was said that he had a lien for it upon the property purchased. If the Plaintiff be entitled to recover back the money paid, and that right be a personal demand against the Defendant, this is not the Court in which such a demand can be enforced; and as to the alleged lien, it is sufficient to observe that no such case is made by the bill. If it had been, it is difficult to imagine how such a case could have been supported, consistently with the ground upon which the Court declines to give to the Plaintiff the benefit of his contract; for such, undoubtedly, would, to a certain extent, be giving him the benefit of it. The mere payment of the money can give no lien. You must, therefore, look to the contract to raise the question of lien; and if the Plaintiff be entitled to any lien, it must be upon or in consequence of the illegal contract; but I do not consider this question as before me. It is undoubtedly a case of great hardship upon the Plaintiff to have parted with his money, and now to be denied the fruits of it; — but this hardship is common to all cases of contract which cannot be enforced, from their illegality. It was stated at the bar, and, I believe, stated in the answer, that the Defendant had offered to return the money advanced by the Plaintiff. As an honest man, this was, and clearly is, his duty; but in this suit I have no power to enforce it. I think the judgment of the Vice-Chancellor supported by principle and authority; and I must therefore dismiss this appeal with costs.

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*See this Case in the
Court below: 1. Keen, 826.*

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Jan. 21. 25.

THE bill stated that *William Moscrop*, late of *Calcutta*, merchant and banker, died on the 14th of *January* 1801, intestate, leaving a widow, now the Defendant *Anna Tyler*, and an only child, *Margaret Maria Moscrop*; and that *W. Moscrop* was, at the time of his decease, possessed of a very large personal estate; and that on the 13th of *March* 1801, letters of administration to his effects were granted to his widow, the Defendant *Anna Tyler*, then *Anna Moscrop*, by the Supreme Court of Judicature at *Fort William*, in *Bengal*, being the proper Court for that purpose; and that *Anna Tyler* thereby became and now was the sole legal personal representative of *W. Moscrop*. The bill then stated that *Anna Tyler*, then *Anna Moscrop*, possessed the personal estate of *W. Moscrop* to a very large amount, and after payment of all his debts and funeral expenses, and the expenses of the letters of administration, appropriated to her own use, as being his widow, one third part of such personal estate, and retained

Although the husband of an administratrix may have become liable to make good to the next of kin of the intestate the assets received by himself or his wife during the coverture, yet if the husband, at his death, makes his wife his executrix, and she possesses assets more than sufficient to answer the demands of the next of kin, after paying the other debts, the estate of the husband is discharged; and therefore the next of

kin cannot sue an administrator *cum testamento annexo* of the husband.

To a bill which seeks an account of the assets of an intestate who died in *India* possessed by a personal representative there, a personal representative of the intestate constituted in *England*, is a necessary party, although it does not appear that the intestate at the time of her death had any assets in *England*. And it is not sufficient, in order to avoid a demurrer for want of parties in such a case, that the personal representative constituted in *India*, who is out of the jurisdiction, is made a party, and that process is prayed against her when within the jurisdiction; although the bill alleges that the *Indian* Court was the proper Court for granting administration, and that the administratrix constituted by it is the sole legal personal representative of the intestate.

Although it is much of course to give leave to amend when a demurrer for want of parties is allowed; yet if the Court sees that the frame of the bill, as it then stands, is not such as entitles the Plaintiff to relief as against the demurring party, leave to amend will be refused.

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retained in her hands the remaining two third parts of such personal estate, to which *M. M. Moscrop* was entitled, as the only child of *W. Moscrop*; and that the same two third parts remained in the hands of *Anna Tyler*, then *Anna Moscrop*, until her marriage with *George Peter Tyler* after mentioned.

The bill then stated that on the 11th of *November 1801*, *Anna Tyler*, then *Anna Moscrop*, intermarried, at *Calcutta*, with *George Peter Tyler*, late of *York Place, St. Marylebone*, in the county of *Middlesex*, but then residing at *Calcutta*; and that upon the marriage of *Anna Tyler* with *G. P. Tyler*, *G. P. Tyler* obtained the control over the two third parts of the personal estate of *W. Moscrop* which then remained in the hands of *Anna Tyler*, and to which *M. M. Moscrop* was so entitled as aforesaid; and that on the 1st of *May 1803*, *G. P. Tyler*, and *Anna* his wife, placed in the hands or paid to the use of *William Fairlie*, late of *Calcutta*, merchant, the sum of 92,052 sicca rupees, being part of the personal estate of *W. Moscrop*, which had so remained in the hands of *Anna Tyler* and to which *M. M. Moscrop* was so as aforesaid entitled. The bill then stated that on the 14th of *February 1803*, *Anna Tyler* had issue by *G. P. Tyler* a son, namely the Plaintiff, *George Dacre Alexander Tyler*, and that on the 7th of *December 1804*, *M. M. Moscrop* died at *Calcutta*, intestate, unmarried, and an infant of the age of five years or thereabouts, leaving her mother *Anna Tyler* and the Plaintiff her only next of kin; and that shortly after her decease, letters of administration to her effects were granted to *Anna Tyler*, by the Supreme Court of Judicature at *Fort William*, being the proper court for that purpose; and that *Anna Tyler* thereby became and now was the sole legal personal representative of *M. M. Moscrop*.

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The bill then stated that upon the death of *M. M. Moscrop*, *G. P. Tyler*, or *Anna Tyler*, with the consent and concurrence and privity of *G. P. Tyler*, was in possession of all such parts of the personal estate of *M. M. Moscrop* as had not been previously placed in the hands or paid to the use of *W. Fairlie*; and that upon the death of *M. M. Moscrop*, *Anna Tyler* and the Plaintiff, as her only next of kin, became entitled, in equal shares, to the whole of her personal estate, and that such personal estate was of very great value.

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The bill further stated that the whole of the sum of 92,052 sicca rupees, constituting part of the personal estate and effects of *M. M. Moscrop*, was, at the time of her decease, in the hands, or under the control, of *W. Fairlie*, and that such sum of 92,052 sicca rupees remained in his hands from the time of her decease until the 31st of *December* 1814, and that such sum of 92,052 sicca rupees was, during the whole of that interval, employed by *W. Fairlie* in his business as a merchant, or otherwise invested by him, and that, by means of such employment and investment, large profits were made by, and large amounts of interest accrued upon, such sum of 92,052 sicca rupees; and that such profits and interest were, from time to time, added to the principal from which the same had proceeded, by way of accumulation; and that on the 31st of *December* 1814, the amount of the personal estate of *M. M. Moscrop* in the hands of *W. Fairlie*, including the accumulations, was the sum of 262,103 sicca rupees, which sum was, on the 31st of *December* 1814, transferred and paid by *W. Fairlie* to *Anna Tyler* with the privity and concurrence of *G. P. Tyler*; and that *G. P. Tyler*, as the husband of *Anna Tyler*, or *Anna Tyler*, with the privity and concurrence of *G. P. Tyler*, possessed and received the whole of the said sum of 262,103 sicca rupees.

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The bill then stated that *G. P. Tyler* by his will, dated the 16th of *November* 1833, directed his just debts, funeral and testamentary expenses, to be paid out of his real and personal estate, and devised all his real and personal estate and effects whatsoever to *Anna Tyler*, and appointed her sole executrix. The bill then stated that *G. P. Tyler* died in the month of *November* 1834, leaving the Plaintiff his heir at law; and that *Anna Tyler*, on the 20th of *February* 1835, proved the will in the Supreme Court of Judicature at *Fort William*, being the proper court for that purpose, and that she thereby became and now was the legal personal representative of *G. P. Tyler* in the *East Indies*. The bill also stated that on the 3d of *October* 1835, letters of administration, with the will annexed, of the goods, chattels, and credits of *G. P. Tyler*, were duly granted by the prerogative court of *Canterbury*, being the proper ecclesiastical court in *England*, to the Defendant *Peter Bell*, as the lawful attorney of *Anna Tyler*, he being first sworn duly to administer, for her use and benefit, then residing at *Calcutta*, and until she should duly apply for and obtain probate of the will to be granted to her, and that *Bell* thereby became and now was the legal personal representative of *G. P. Tyler* in *England*. The bill then stated that *Anna Tyler* had possessed the personal estate of the testator to a very large amount, and to an amount much more than sufficient to answer the Plaintiff's demand thereafter mentioned, after paying all the other just debts and the funeral and testamentary expenses of *G. P. Tyler*; and that she had also entered into the possession and receipt of the rents and profits of his real estate, and had received the same to a very large amount, and that she had paid all the debts, and funeral and testamentary expenses of *G. P. Tyler*, other than the Plaintiff's demand in this suit. The bill then stated that *Bell* had also possessed the personal estate

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estate of *G. P. Tyler* in this country to some amount; and that there was not now, and that there never had been, since the decease of *G. P. Tyler*, any creditor of *G. P. Tyler* in this country, except the Plaintiff.

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The bill then stated that the Plaintiff was, in the year 1806, being then of the age of three years only, sent from the *East Indies* to this country, and that he had ever since been resident in this country; and that he did not discover, until within the last seven years, that he was entitled to one half of the personal estate of *M. M. Moscrop*; and that from and immediately after the time at which he made such discovery, and from thenceforward up to the present time, he had frequently made application to *G. P. Tyler* during his lifetime, and to *Anna Tyler*, since his decease, as his executrix; and also to *Bell* as such administrator as aforesaid, and had requested them respectively to account for and pay to the Plaintiff the amount or value of the share to which the Plaintiff was entitled, of the personal estate and effects of *M. M. Moscrop*; but that *G. P. Tyler*, and *Anna Tyler* and *Bell*, since his decease, had absolutely refused, and that *Anna Tyler* and *Bell* did still refuse to comply with the Plaintiff's requests.

The bill then charged that the Plaintiff was the sole next of kin of *M. M. Moscrop* at the time of her death, other than and except *Anna Tyler*, and that the Plaintiff was and is entitled to an equal moiety of the sum of 262,103 sicca rupees so transferred and paid to *Anna Tyler* as aforesaid, together with interest thereon from the 31st of *December* 1814, up to the time of payment, and also to an equal moiety of all the residue of the personal estate of *M. M. Moscrop*. And it charged that *G. P. Tyler* became and was responsible to *M. M. Moscrop*,
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and her personal representatives and next of kin, for the two third parts of the personal estate of *W. Moscrop* which, at the time of *G. P. Tyler's* marriage with *Anna Tyler*, remained in her hands and belonged to *M. M. Moscrop*; and that *G. P. Tyler* became and was in like manner responsible, not only for his own acts, but also for all the acts of his wife *Anna Tyler* in the administration of or with respect to the personal estate of *W. Moscrop*; and particularly, that *G. P. Tyler* was responsible in like manner for the act of placing in the hands or paying to the account of *W. Fairlie*, the sum of 92,052 sicca rupees, and was liable to make good the sum so placed in his hands, or paid to his use; and that the estate of *G. P. Tyler* is responsible to the next of kin of *M. M. Moscrop*, and to the Plaintiff as one of such next of kin, for all such parts of the personal estate and effects of *M. M. Moscrop* as were possessed by him and *Anna Tyler*, or by either of them, during the period of their marriage, whether such personal estate was possessed in right of *Anna Tyler* as administratrix of *W. Moscrop*, or as administratrix of *M. M. Moscrop*, or otherwise. The bill then charged that *G. P. Tyler* became and was a trustee for the Plaintiff of one moiety of the sum of 262,103 sicca rupees, so transferred and paid to *Anna Tyler* as aforesaid.

The bill also charged that within two years then last past *Anna Tyler* had frequently admitted in writing, by letters addressed to the Plaintiff, and otherwise, that the sum of 262,103 sicca rupees was paid and transferred to her as aforesaid, and that the same constituted part of the personal estate of *M. M. Moscrop*; and that *Anna Tyler* had repeatedly made such admission and acknowledgment in writing since the decease of *G. P. Tyler*. The bill further stated that *Anna Tyler*,

Tyler, by a letter, dated at *Calcutta* the 8th of *April* 1835, and addressed to the Plaintiff, stated and admitted that the clear personal estate of *W. Moscrop* on the 1st of *May* 1803 produced the sum of 138,078 sicca rupees, and that of that sum *M. M. Moscrop* was then credited two thirds, amounting to 92,052 sicca rupees, and that she, *Anna Tyler*, herself received one third, or 46,026 sicca rupees; and that the account current of *M. M. Moscrop* on the 30th of *April* 1805 shewed a balance in her favour of 109,159 sicca rupees on account of such personal estate of *W. Moscrop*. The bill then charged that after the date of the letter of the 8th of *April* 1835, *Anna Tyler* transmitted to the Plaintiff, by the post, certain accounts or copies of certain accounts of the firm of *Fairlie, Gilmore, and Co. of Calcutta*, by which it appeared that on the 1st of *May* 1803 the personal estate of *W. Moscrop* had produced a surplus of 138,078 sicca rupees, 14 annas, 2 pice, and that the first item of such accounts was a credit to *W. Fairlie*, as a trustee for *M. M. Moscrop*, for two thirds of that amount, being 92,052 sicca rupees, 9 annas, 5 pice, as an ascertained balance; and that on the said 1st of *May* 1803, there were transferred into the hands of *W. Fairlie*, as the trustee of *M. M. Moscrop*, for her use, bonds and notes to the amount of 88,253 sicca rupees, 14 annas, 2 pice, for which, together with the interest then due thereon, his account, as such trustee, was debited in the sum of 90,245 sicca rupees, 11 pice: and that such accounts, so transmitted by *Anna Tyler* to the Plaintiff, also shewed that the account of *W. Fairlie*, as such trustee as aforesaid, was from time to time thenceforward credited with the interest due upon such bonds and notes, and with the principal amounts thereof, when the same were respectively paid off; and that the account of the personal estate of *M. M. Moscrop* was continued by *W. Fairlie* as her trustee

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tee with the firm of *Fairlie, Gilmore, and Co.* from the 1st of *May* 1803, down to the 31st of *December* 1814, and that on the last-mentioned day the balance due to *W. Fairlie*, as trustee for *M. M. Moscrop*, was the sum of 262,103 sicca rupees, 4 annas, 6 pice, and that such last-mentioned sum was, on the 31st day of *December* 1814, transferred to the credit of *Anna Tyler* in the books of the firm of *Fairlie, Gilmore, and Co.*, in which *W. Fairlie* was a partner, and with which firm *Anna Tyler* had had an account current in her own name for many years then last past. And the bill charged that by such accounts so transmitted it also appeared, that *Anna Tyler* was, on the 31st of *December* 1814, indebted to the firm of *Fairlie, Gilmore, and Co.* in the sum of 130,000 sicca rupees and upwards; and that it also appeared that an adequate part of the sum of 262,103 sicca rupees, 4 annas, 6 pice was applied in liquidation of the debt so due from *Anna Tyler* to the firm of *Fairlie, Gilmore, and Co.*, and that *Anna Tyler* was credited in the books of the firm with the amount of the sum of 262,103 sicca rupees, 4 annas, 6 pice, after deducting the amount of the debt which had been so due from her as aforesaid: and that from thenceforward, until the 30th of *April* 1816, the firm continued an account with *Anna Tyler* in her own name, and from time to time paid to the order or for the use of *Anna Tyler*, out of the amount with which she was so credited, various sums of money, in respect of which they debited her in their account with them: and that on the 30th of *April* 1816, a balance of the accounts of *Anna Tyler* with the firm of *Fairlie, Gilmore, and Co.* was struck, and the balance in favour of *Anna Tyler* was found to be 174,046 sicca rupees 12 annas 8 pice. The bill charged that no accounts or copies of accounts of *Anna Tyler* with the firm of *Fairlie, Gilmore, and Co.*, beyond the 30th of *April* 1816, had been transmitted by her to the Plaintiff.

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The bill then charged that it was the fact, and that it had been frequently, within the last two years, admitted and acknowledged in writing by *Anna Tyler*, before and since the death of *G. P. Tyler*, and also by *Bell*, that neither the sum of 262,103 sicca rupees, nor any part thereof, nor any interest in respect thereof, nor any part of the personal estate of *M. M. Mascrop*, had ever been accounted for or paid by *G. P. Tyler*, or by *Anna Tyler*, or by *Bell*, or by any other person, to the Plaintiff, or to any person on his behalf; nor had any part thereof been applied for the Plaintiff's benefit: and the bill charged that one moiety of the sum of 262,103 sicca rupees, together with interest, and also one moiety of all the remaining personal estate of *M. M. Mascrop*, was now due and payable to the Plaintiff from the estate of *G. P. Tyler*, and from and by *Anna Tyler* and *Bell*, as the personal representatives of *G. P. Tyler*; and that *Anna Tyler*, as personal representative of *M. M. Mascrop*, and also of *W. Mascrop*, ought to account for and pay to the Plaintiff one moiety of the whole of the personal estate of *M. M. Mascrop*, together with all accumulations thereon.

The bill further charged that *G. P. Tyler*, or *Anna Tyler*, with his privity and concurrence, invested the sum of 262,103 sicca rupees, and the other personal estate of *M. M. Mascrop*, at interest, and in various modes of investment and security, by means of which great interest and profits were made thereon; and, that *Anna Tyler* and *Bell*, as such personal representatives of *G. P. Tyler*, ought to account to the Plaintiff for one moiety of all such interest and profits.

The bill then charged that the Plaintiff had always been dependent for his maintenance upon *G. P. Tyler* during his life, and upon *Anna Tyler* since his decease,

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until within the last six months, and that, by reason of such dependence, the Plaintiff had been unable, until within such period as last aforesaid, to institute any suit or other proceeding against *G. P. Tyler*, or against *Anna Tyler* or *Bell*, since the decease of *G. P. Tyler*, for the purpose of compelling payment and satisfaction of his demand; and the bill charged that *G. P. Tyler* in his lifetime, and *Anna Tyler* since his decease, constantly threatened, that if the Plaintiff should institute any such suit or proceeding, the allowance made to the Plaintiff, for his maintenance, by *G. P. Tyler*, and by *Anna Tyler* since his decease, should be stopped; and that *Anna Tyler* had actually given orders to her agents in this country to stop the Plaintiff's allowance, in case any such suit or proceedings should be instituted by the Plaintiff; and that *Anna Tyler* was now resident in *Bengal*, out of this realm, and out of the jurisdiction of the Court.

The bill further charged that a sum of 14,425*l.* 1*s.* 11*d.* stock, in the 3 per cent consolidated bank annuities, was now standing, and had for several years been standing in the name of *G. P. Tyler*, and that the Plaintiff had very recently discovered, as the fact was, that *Anna Tyler* had directed *Bell* forthwith to sell out the stock, and to transmit the money to be produced by such sale to herself in the *East Indies*; and that *Anna Tyler* had given a sufficient power of attorney or other authority to *Bell* for that purpose, and that *Bell* was about immediately to comply with the direction of *Anna Tyler*; and that, unless the injunction of the Court should interpose, the stock would be immediately sold out by *Bell*, and the produce forthwith transmitted to *Anna Tyler* in the *East Indies*, and that thereby the Plaintiff's demand and his remedy against *Anna Tyler* and *Bell* respectively,

ively, as personal representatives of *G. P. Tyler*, and against the estate of *G. P. Tyler*, would be greatly endangered. The bill then charged that *Anna Tyler* and *Bell* ought to be restrained by injunction from transferring or selling the stock, or receiving the dividends thereon; and that the stock ought to be transferred into the name of the Accountant-General; and that the Bank of *England* ought to be restrained from suffering any transfer of such stock, except to the Accountant-General, or from paying any dividends otherwise than to the credit of the cause.

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The bill charged that the Defendant, *William Hardinge Tyler*, of *Mattra*, in the province of *Bengal*, the next brother of the Plaintiff, and a son of *Anna Tyler* by *G. P. Tyler*, claimed some interest in the personal estate of *M. M. Moscrop*; and that in support of such claim, he alleged and pretended that he was born in the lifetime of *M. M. Moscrop*; whereas *M. M. Moscrop* died on the 7th of *December* 1804, and *W. H. Tyler* was not born till the 2d of *December* 1805.

The bill also charged that *W. H. Tyler* was now residing at *Mattra*, out of the jurisdiction; and that *Anna Tyler* and *Bell* colluded with him and abetted his claim.

The prayer of the bill was, that an account might be taken of the personal estate of *M. M. Moscrop*, possessed by *Anna Tyler*, or by *G. P. Tyler* in his lifetime, or by both or either of them, or by any person or persons by the order or for the use of both or either of them; and that one moiety of such personal estate might be paid or transferred to the Plaintiff; and that *G. P. Tyler* might be declared to have been a trustee for the Plaintiff of one moiety of the sum of 262,103 sicca rupees, 4 annas, 6 pice, and of one moiety of the other parts of the personal

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sonal estate of *M. M. Moscrop* possessed or received by *G. P. Tyler* or by *Anna Tyler* with the privity of *G. P. Tyler*; and that the estate of *G. P. Tyler* might be declared to be answerable to the Plaintiff for such moiety of the sum of 263,103 sicca rupees, 4 annas, 6 pice, at the rate of exchange, on the 31st of *December* 1814, with interest up to the day of payment; and that *Anna Tyler* and *Bell*, as personal representatives of *G. P. Tyler*, might be decreed to pay to the Plaintiff one moiety, not only of the sum or value of 262,103 sicca rupees, 4 annas, 6 pice, but also of such other personal estate as before-mentioned, with interest; and if *Anna Tyler* and *Bell* should not admit assets of *G. P. Tyler*, then that the usual accounts might be taken of the personal estate of *G. P. Tyler*, and, if necessary, of his real estates applicable to the payment of his debts; and that the Plaintiff might, out of such personal estate, and, if necessary, out of such real estates, be paid his demand; and that, in the meantime, *Anna Tyler* and *Bell* might be restrained by injunction from selling or transferring the sum of 14,425*l.* 1*s.* 11*d.* stock, or any other stock then standing in the name of *G. P. Tyler*, and from receiving the dividends thereon; and that such stock might be transferred into the name of the Accountant-General, in trust in the cause; and that the Bank of *England* might be restrained from permitting any transfer of the stock to any person or persons other than the Accountant-General, or from paying any dividends thereon otherwise than to the credit of the cause.

The bill prayed process against *Bell*, and also against *Anna Tyler* and *W. H. Tyler*, when they should come within the jurisdiction.

The Vice-Chancellor granted an *ex parte* injunction in the terms of the prayer of the bill.

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The Defendant *Bell* then demurred to the bill, upon two grounds; first, for want of equity; and secondly, because no personal representative of *Margaret Maria Moscrop*, constituted such by any ecclesiastical court in this country, had been made a party to the suit. The Master of the Rolls, before whom the demurrer was argued, did not decide upon the demurrer for want of equity; but his Lordship allowed the demurrer for want of parties, and refused the Plaintiff leave to amend. The Plaintiff thereupon appealed.

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Mr. *Tinney* and Mr. *Craig*, in support of the appeal.

The case stated by the bill is quite sufficient to make the assets of *George P. Tyler* responsible for all such parts of the property, of *Margaret Maria Moscrop*, as were possessed either by himself or his wife during the coverture. This is abundantly clear from Lord *Redesdale's* elaborate judgment in *Adair v. Shaw* (a), and from the decree made by the Court in that case. He became a trustee for the Plaintiff; and the bill, in effect, states a gross breach of trust on his part. His widow has become beneficially entitled to all his estate: *Bell* is merely her instrument; and they unite to defeat the Plaintiff's just claim.

No representation to *Margaret Maria Moscrop* could be taken out in this country. The bill alleges that *Anna Tyler* is the sole legal personal representative of her child. It does not appear, upon the face of the bill, that *Margaret Maria Moscrop* had any personal estate in *England* at the time of her death; and, unless she had, no administration to her effects could be taken out in this country, although parts of her personal property might afterwards be brought here. The effect of probate or letters

(a) 1 Sch. & Lef. 243.

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letters of administration is only to give an authority to the executor or administrator to collect such assets as, at the time of the testator's or intestate's death, were within the jurisdiction of the Court by which the probate or administration was granted. The situation of the property at the time of the death of a testator or intestate, determines the jurisdiction in which the probate or administration is to be taken out; and no subsequent shifting of the assets can make any difference; *Attorney-General v. Dimond* (a). It was unnecessary to allege that *Margaret Maria Moscrop* had no assets in *England* at the time of her death: it is for the Defendant to shew, on the face of the bill, that she had then assets, of which an *English* administration could be granted. Unless this appears on the face of the bill, no defect of parties appears there. When a plaintiff alleges probate or administration to have been granted by one jurisdiction, it is never considered necessary for him to go on to allege that there were not *bona notabilia* in any other jurisdiction; *Metcalf v. Metcalf* (b).

If it be said that the personal estate of the child, which at the time of her death had been possessed by her stepfather, *G. P. Tyler*, constituted assets, as being a debt due to her, the conclusive answer is, that a debt is assets in the place in which the debtor happens to reside at the time of the testator's or intestate's death. This is established by many old authorities, and was recognised in *Attorney-General v. Dimond*. *G. P. Tyler* then resided in *India*.

Anderson v. Cawtter (c) shews that this Court will recognise and proceed against a personal representative,

as

(a) 1 *Crom. & Jerv.* 356.(c) 2 *Mylne & Keen*, 763.(b) 1 *Keen*, 74.

as such, although his title may have been derived from a foreign jurisdiction. Although Mrs. *Tyler* is not now within the jurisdiction of this Court, she may come within it to-morrow, or long before the hearing of the cause; or she may direct an appearance to be entered, and the suit to be prosecuted on her behalf while she is still abroad; or she may be served in *India* with process under the recent acts (a).

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The bill prays an account, not of the personal estate of *Margaret Maria Moscrop* generally, but of those parts of it which have been possessed by *Anna Tyler* or her late husband. That account is prayed only for the purpose of ascertaining the sum which the Plaintiff will be entitled to recover. It is not sought to administer *Margaret Maria Moscrop's* estate, generally, in this suit. She died thirty years ago, at five years of age, and it is almost impossible that she could have incurred any debts which are still unsatisfied. The bill goes on to pray that *George P. Tyler's* assets may make good the Plaintiff's share of that precise and ascertained sum, which is alleged to have been received by Mr. *Tyler*, or by Mrs. *Tyler* with his privity and concurrence. The Plaintiff may, at the hearing, be satisfied with this part of the relief sought, and may abandon his right to an account of all the other assets received by Mr. or Mrs. *Tyler*. If the Plaintiff should take this course, no personal representative will be necessary; for it is the demand of an account only, which renders necessary the presence of a personal representative, constituted either in *India* or in this country. This objection is one to be taken, if at all, rather at the hearing, than upon demurrer; and it applies only to part of the bill. The Defendant's
 demurrer

(a) 2 & 3 W. 4. c. 33. and 4 & 5 W. 4. c. 82.

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demurrer for want of parties, however, extends to the whole bill, instead of to this part only; and it is, on that account, untenable.

The cases of *Lowe v. Fairlie* (a) and *Logan v. Fairlie* (b), were cited below in support of the demurrer for want of parties; but the present case does not resemble either of them. In *Lowe v. Fairlie*, the plaintiff had no pretence for calling for an account from the defendants; for they were mere agents, and, as such, answerable to their principals. In *Logan v. Fairlie*, Sir John Leach erroneously supposed that the bill was instituted for the administration of the testator's estate, and therefore observed that some personal representative of the testator should be before the Court; but the suit was only for the distribution of a particular ascertained fund, which had been appropriated in *India*, and transmitted to this country. The objection even in that case, however, was not that a personal representative constituted in *England* was not a party to represent that fund; and the case of *Attorney-General v. Dimond*, shews that no representative constituted in *England*, can represent assets which were in *India* when the testator or intestate died. In *Jackson v. Forbes* (c), it appears that an account was taken in this Court of the assets of a testator who had died in *India*, although no probate had been taken out in *England*. If the practice of this Court were to require that in such a case as this the great expense of an *English* administration should be incurred, when there would be no assets upon which it could operate, such a practice would be most oppressive.

Even if your Lordship should allow the demurrer for want of parties, leave to amend will be given. In the recent

(a) 2 *Mad.* 101.(b) 2 *Sim. & Stu.* 284.(c) 2 *Crom. & Jer.* 582.; and2 *Tyrr.* 354.

recent case of *Lumsden v. Fraser* (a), your Lordship referred to the leave to amend as being of course in such cases.

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If the Plaintiff can procure administration from an *English Ecclesiastical Court*, either by discovering that *Margaret M. Moscrop* had assets in *England* when she died, or upon any other ground, he can state that administration by way of amendment; and it will have relation to the time of the intestate's death; *Humphreys v. Humphreys* (b), *Fell v. Lutwidge* (c).

The *Solicitor-General* and Mr. J. Russell, *contra*, contended that the allegations contained in the bill did not bring the case within the authority of *Adair v. Shaw*; and, on the question of parties, they relied upon the cases of *Lowe v. Fairlie* and *Logan v. Fairlie*, and a MS. case of *Lewis v. Gentle*, before the Vice-Chancellor.

Mr. Tinney, in reply.

The LORD CHANCELLOR, (after stating the allegations and prayer of the bill.)

Jan. 25.

It is uncertain whether the first part of this prayer be meant to pray for any account of the estate of *M. M. Moscrop*, against Mrs. Tyler, before or since her coverture, as her representative; but it is clear that, as to the half of the 262,103 sicca rupees, and of the other personal estate of *M. M. Moscrop* possessed during the coverture, the Plaintiff proceeds against the estate of Mr. Tyler only. It is with the latter part alone that

Mr.

(a) *Ante*, vol. i. p. 589.

(c) *Barnard*. 319.

(b) 3 P. Wms. 351.

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Mr. *Bell* has any thing to do. The allegation most favourable for the Plaintiff is, that in 1814 Mr. *Tyler*, or Mrs. *Tyler* with his concurrence, received the 262,103 sicca rupees from *William Fairlie*.

Suppose he received it, and afterwards died, and his representative afterwards repaid it to the personal representative of *M. M. Moscrop*; would not his estate be discharged? But this the bill alleges that he did, by alleging that Mrs. *Tyler* has of his estate sufficient to pay what he owed to the estate of *M. M. Moscrop*, of which she is representative. The creditor, that is, Mrs. *Tyler*, as representative of *M. M. Moscrop*, is executrix of Mr. *Tyler* the debtor, and retains the debt. If this be not payment, how can it be paid? Who is to receive it?

The bill alleges that Mr. *Tyler* became a trustee for the Plaintiff; but no facts are stated to justify this statement. No conversion of the 262,103 sicca rupees is stated, or any division of it between Mrs. *Tyler* and the Plaintiff, but the whole of it is treated as *part* of the estate of *M. M. Moscrop*. Suppose the bill had alleged that Mr. *Tyler* had appointed some other person his executor, and that such executor had, after his death, paid to Mrs. *Tyler*, as administratrix of *M. M. Moscrop*, what Mr. *Tyler* had received of that estate; could the Plaintiff have demanded payment out of the estate of Mr. *Tyler*? Certainly not. Suppose there had been two administrators or two executors of *M. M. Moscrop*, and that one had died, and the bill had alleged that the representative of the deceased executor had accounted with the surviving executor for all the estate which his testator had received. This is a common allegation to avoid the necessity of making the executor of a deceased executor party. Supposing, therefore, Mr. *Tyler*'s estate

to

to have been liable for all that had been received during the coverture; it is no longer liable, if the administratrix of *M. M. Moscrop* has received back all that he had received. The Plaintiff argues that Mr. *Tyler* was debtor to him; and he must argue that he could not pay this supposed debt to the administratrix of *M. M. Moscrop*; for this there is no foundation: he may have been debtor to the estate of *M. M. Moscrop*; but the bill alleges that such debt has been paid. Is that estate to pay it over again? If that could be so, then Mr. *Tyler's* legatees, if they had been any other than his wife, might sue her in *Calcutta*, and she would discharge herself by shewing that she retained so much to pay what Mr. *Tyler* owed to *M. M. Moscrop's* estate. Then they might sue Mr. *Bell* in this country, and he might be ordered by the Court to pay the same sum; that is, Mr. *Tyler's* estate would pay the debt twice.

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By Mrs. *Tyler's* receiving assets of Mr. *Tyler* sufficient to pay what he had received of *M. M. Moscrop's* estate, the whole of that estate is at home in the hands of the administratrix of *M. M. Moscrop*.

If the Plaintiff cannot establish, upon his statement, that Mr. *Tyler* owed the debt to him, and not to the estate of *M. M. Moscrop*, he must fail, upon his own shewing. There is no allegation to make Mr. *Tyler's* estate debtor to any one, except the statement that he, or Mrs. *Tyler* with his concurrence, received the 262,103 sicca rupees; and that is accompanied by a statement that, he, by his will, put into the hands of the representative of *M. M. Moscrop* more than sufficient to repay that sum and all that is due.

The Plaintiff insists, that Mr. *Tyler's* executor must administer the estate of which his wife was administratrix, and must pay the balance to those beneficially entitled,
and

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and cannot be discharged by payment to the representative of that estate; for this there is no ground. The decree in *Adair v. Shaw* (a) discharges the estate of the husband of an administratrix from so much of the intestate's estate, as, though received by him during the coverture, had after his death come to his widow the administratrix. In this case the bill alleges, that the whole of what the husband had received during the coverture has, since his death, come, in the form of assets, to the hands of the widow, the administratrix; and yet the Plaintiff prays that the husband's estate may pay the whole; and this, without bringing any personal representative of the estate of the intestate before the Court, an estate unadministered and unascertained, as it must depend upon the account of another estate, that of *William Moscrop*, also unadministered, and of which there is no representative before the Court.

The allegation in the bill that *Mrs. Tyler* is out of the jurisdiction, and the prayer of process against her when she shall come within the jurisdiction, are of no avail; for she is not a passive party in whose absence the Court can proceed, but she is a party in whose absence no decree can be made. It was said, however, that *Mrs. Tyler* may appear before the hearing, and that her appearance would make the suit complete as to parties; and this was attempted to be supported by contending that as *M. M. Moscrop* had no property in this country, which, however, does not appear, the administration in *Calcutta* was not only sufficient, but the only administration that could be obtained; the ecclesiastical courts granting letters of administration only of property within their jurisdiction. Again, it is asked, that liberty may be given to amend, in order to obtain this very administration so alleged

to

(a) See 1 *Sch. & Lef.* 275.

to be improper and incapable of being granted. This proposition assumes that if Mrs. *Tyler* were to appear, the suit would be perfect as to parties, without any letters of administration being obtained in this country.

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That an estate cannot be administered in the absence of a personal representative, and that such personal representative must obtain his right to represent the estate from the ecclesiastical court in this country, has, I believe, never before been doubted. The cases of *Tourton v. Flower* (a), *Atkins v. Smith* (b), *Swift v. Swift* (c), *Attorney-General v. Cockerill* (d), *Lowe v. Fairlie* (e), *Logan v. Fairlie* (g), all proceed upon this, that the courts in this country, for the security of property, will not administer the property of a person deceased, in the absence of a person authorised to represent the estate; and that they look only to the judgment of the ecclesiastical courts in this country, in granting probate or letters of administration, to ascertain who are so authorised; and it is immaterial what ecclesiastical court in this country has granted probate, or letters of administration, provided the state of the property was such as to give it jurisdiction. How is this rule affected by the case of the *Attorney-General v. Dimond* (h), which only decided that probate duty, imposed upon the amount of property for or in respect of which probate was granted, was not payable upon property which was in *France* at the time the probate was granted? But did that case decide that the executor was not entitled to administer such property? If so, then, as that case decides that property coming into this country, after the death, does not make any alteration in the probate necessary, though it be assets,

(a) 3 P. Wms. 369.

(b) 2 Atk. 63.

(c) 1 Ball & B. 326.

(d) 1 Price, 165; see p. 179.

(e) 2 Mad. 101.

(g) 2 Sim. & Stu. 284.

(h) 1 Crom. & Jer. 356.

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assets, there would be no one competent to administer it, or capable of acquiring authority for that purpose. But that such is not the case is proved by another case in the same volume, *In Re Ewin* (a), in which an executor, under similar circumstances, was ordered to pay legacy duty upon property in the foreign funds, although such funds formed no part of the property for or in respect of which his probate had been granted.

In *Jackson v. Forbes* (b) the will had not been proved in this country; but the cause had proceeded upon the assumption that it had. *Anderson v. Caunter* (c) was cited for the appellant. It is difficult to reconcile what is there attributed to the Court with the facts of the case. Sir J. Leach thought that an *English* representative was not necessary, because, he says, the estate cannot be administered in this suit; and yet, as against *Clubley's* estate, it was a creditor's suit for payment of what had become due from him as executor in *India* of the original testator. It is difficult to reconcile this with what has been said by the same Judge in *Logan v. Fairlie*.

I am of opinion that the objection, for want of parties, is good; and being of that opinion, if the bill had stated a case for relief against the Defendant *Bell*, permission to amend would have been much of course; but as I am of opinion that the Plaintiff has, by his statement, put himself out of court as to any claim against the estate of Mr. *Tyler*, it would be strange if the practice of the Court made it imperative upon the Court to give leave to amend. When it is said that a bill is never dismissed for want of parties, nothing more is

(a) 1 Cr. & Jerv. 151.

(c) 2 Mylne & Keen, 763.

(b) 2 Cr. & Jerv. 382.; and
2 Tyrw. 351.

is meant than that a Plaintiff, who would be entitled to relief if proper parties were before the Court, shall not have his bill dismissed for want of them, but shall have an opportunity afforded of bringing them before the Court; but if, at the hearing, the Court sees that the Plaintiff can have no relief under any circumstances, is it bound to let the cause stand over that the Plaintiff may add parties to so hopeless a record? There must be a discretion in the Court; and the cases of *Lowe v. Fairlie* and *Lewis v. Gentle* prove that such discretion has been exercised. In the exercise of that discretion, I think that the Master of the Rolls properly in this case refused permission to amend. *Lumsden v. Fraser* (a), was cited as conclusive of the Plaintiff's right to amend. The slightest attention to that case will shew that it has no tendency to support any such proposition. The Vice-Chancellor had allowed a demurrer for want of parties, and given leave to amend. The Plaintiff appealed, and of course did not object to the liberty to amend, nor did the Defendant do so; but the Plaintiff contended that the demurrer ought not to have been allowed, because, if the absent parties were made Defendants, they might demur for multifariousness. To which the Court observed, in substance, that such an argument by the Plaintiff could not avail, as it only proved that he had so erroneously constructed his suit, as to make it open to objection for want of parties, or for multifariousness. I am of opinion that this bill is clearly defective for want of parties; and that the case stated is such as to make it impossible to obtain any relief upon this bill against the Defendant *Bell*, and that the Plaintiff, therefore, ought not to have leave to amend.

Appeal dismissed with costs.

(a) *Ante*, vol. i. p. 589.

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1836.

1836.
Aug. 9. 15.1837.
Feb. 4.

In the Matter of JEREMIAH NEWMAN, a Lunatic.

And in the Matter of the Act for the Abolition of Fines
and Recoveries.

Principles
by which
the Lord
Chancellor,
when pro-
tector of a
settlement in
the place of a
lunatic, will
be guided, in
giving or with-
holding his
consent to a
deed of dis-
position under
the Fines and
Recoveries
Act.

THE petition of *Charles Seale* and *Edith* his wife, stated that *William Newman* deceased, by his will, dated the 2d of *July* 1810, devised to *Samuel Jones* and *Thomas Dowle*, his messuage and farm called *Walton's Hill*, and all his free lands and hereditaments occupied therewith, situate in the parishes of *Deerhurst*, *Elmstone*, *Hardwicke*, and *Lye* in the county of *Gloucester*; and also all his lands in *Artersfeld* and *Brittsfeld*, and his free lands in *Wickham* in the parish of *Deerhurst* afore-said, with all the appurtenances, or the allotment set out in lieu of those lands under the *Deerhurst Inclosure Act*; to hold the same unto *Samuel Jones* and *Thomas Dowle*, and their heirs, to the use of his (the testator's) son *Jeremiah* (the lunatic) and his assigns, for his life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of all and every the children of his son *Jeremiah*, in equal shares and proportions as tenants in common, and the heirs of their respective bodies, and in default of such issue, then to the use of all the other children whom he (the testator) should leave at his decease, except his sons *John* and *Samuel*, in equal shares and proportions, as tenants in common, and the heirs of their respective bodies; and in default of such issue, then to the use of his (the testator's) own right heirs for ever.

The

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The petition then stated that the testator died soon after the date of his will, without having altered or revoked the same, and left at his decease *William Ireland Newman*, his eldest son and heir at law, *David Newman*, *Mary Martha Dowle*, wife of the said *Thomas Dowle*, *Ann Hough*, wife of — *Hough*, the petitioner *Edith Seale*, wife of the petitioner *Charles Seale*, and *Elizabeth Newman*, his six other children, except his sons *John Newman* and *Samuel Newman*, who were both since deceased. The petition also stated, that the lunatic *Jeremiah Newman*, immediately after the testator's death, entered into possession of the *Walton's Hill* estate and premises, so devised to him as before mentioned, and continued in such possession until he was found a lunatic; since which time *William Ireland Newman* had been in the occupation thereof. The petition went on to state, that under the circumstances before mentioned, the lunatic was tenant for life, with remainder to his children, if any, as tenants in common in tail, with remainder, as to one undivided sixth part, to the petitioner *Edith Seale* in tail, with remainder, as to the same one undivided sixth part, to the right heirs of the testator in fee, such right heir being *William Ireland Newman*; and that by virtue of the act for the abolition of fines and recoveries, the lunatic became and was the sole protector of the before-mentioned settlement of the premises called *Walton's Hill*, and the lands and appurtenances thereto belonging. The petition then stated, that a commission was issued on the 20th of *February* 1821, and was executed on the 12th of *March* 1821, by an inquisition taken, upon which it was found that *Jeremiah Newman* was then a lunatic, and did not enjoy lucid intervals, and had been in the same state of lunacy for nine months then past. The petition added that no further proceedings had been taken under the commission, and that no person had been appointed committee of the person or

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of NEWMAN.

of the estate of the lunatic; but that *William Ireland Newman* had had the custody of the lunatic ever since he was found such.

The petition then stated, that the petitioners had been married ten years and upwards, and had not any children, and that they were anxious to make and concur in making an effectual disposition of their undivided sixth part in remainder, with the consent and approval of the Lord Chancellor, and to bar the remainders over in that sixth part, and to settle such sixth part upon the petitioner *Edith Seale* for life, with remainder to the petitioner *Charles Seale* for life, with remainder to their issue in fee; and if no issue, with remainder to the survivor in fee; subject, nevertheless, to a joint power of appointment by both the petitioners during their joint lives, by way of sale, mortgage, or otherwise.

The petition alleged that the lunatic was forty-three years old, or thereabouts, and had never been married, and that there were no incumbrances upon the said sixth part of the property.

The prayer of the petition was, that the Lord Chancellor, as the protector of the settlement under the act for the abolition of fines and recoveries, would consent to such disposition of the undivided sixth part as was thereinbefore mentioned; or that his Lordship would make such other order as would entitle the petitioners to make an effectual disposition of their one sixth part of the premises to the effect thereinbefore stated.

Mr. *Wigram*, in support of the petition.

On

On a subsequent day, Mr. *Girdlestone*, on behalf of *William Ireland Newman*, the heir at law of the testator, submitted that the Lord Chancellor's concurrence, as protector, in barring the entail, was by no means a matter of course; but that his Lordship would consider himself as standing in the situation in which the lunatic would stand if he were sane.

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of *NEWMAN*.
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August 13.

The LORD CHANCELLOR.

1837.
Feb. 4.

I have looked into the papers in this case, and I do not think that I can make the order prayed.

The petition came before me as protector of the settlement under the fines and recoveries act, to induce me to consent to a deed of disposition on the part of the lunatic, who is tenant for life; to act, in fact, for the tenant for life, in order to give effect to a recovery. The lunatic is tenant for life, with remainder to his children. He has no children, and is not married; the estate is limited in remainder to his brothers and sisters in tail, with an ultimate remainder to the right heirs of the testator. The eldest son of the testator and eldest brother of the lunatic is the testator's heir at law; and he has a remainder in tail, in one sixth, with the ultimate remainder in fee in the entirety. This is an application by the husband of one of the daughters of the testator, who is entitled, in default of issue of the lunatic, to an estate tail in one sixth; and it asks that I would consent, on behalf of the lunatic tenant for life, to a deed, the object of which is to bar the issue of that daughter, and of course to destroy the remainder to the heirs of the settlor, in order to give this share of the property to the husband and wife, to dispose of as they

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please; for it is to be settled to such uses as they shall appoint.

As protector of the settlement, the only duty of the Court is to see what, with reference to the interests of the family, it would be proper for the tenant for life to do; and the object must be rather to protect the objects of the settlement, than to give any benefit to one member of the family to the exclusion of the others. Now, if nothing is done, one sixth will go to this daughter, and her children, if she has any, and if not, to the eldest son of the testator as his right heir: and I am asked to consent to that which will take it away from the eldest son, and take it away from the family, by giving it to the husband of the daughter. That would be anything but protecting the settlement: it would be destroying the settlement; giving the estate to a person not a member of the family, namely, the husband of the daughter. I should not consider that it would be a proper act for the tenant for life to concur in a deed of disposition to that effect.

It is not very easy to lay down any general rule on this subject; but there were two cases upon it before Lord *Brougham*. One of them (a) was very similar to the present; the object being to bar the remainders which had been limited to collateral relations, and the application there was refused: but in the other case (b), the object was to make a provision for one of the lunatic's family, his son, and Lord *Brougham* thought that a fit case for his concurrence as protector. So that he consented, where the intention was to provide for the immediate

(a) *In re Blewitt, 3 Mylne & Keen, 250.*

(b) *Grant v. Yea, In re Yea, 3 Mylne & Keen, 245.*

mediate family of the lunatic; but declined to consent where the object was to give a benefit to one member of the family at the expense of the others.

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Order refused.

BIEDERMANN v. SEYMOUR.

1837.
Jan. 19.

THIS suit was instituted by parties interested under a will. At the hearing at the Rolls on the 12th of *May* 1835, it appeared that some of the persons interested under the will had not been made parties to the suit, and that it was necessary that they should be made parties. The Court therefore ordered that the cause should stand over, with liberty to the Plaintiffs to amend, by adding parties, and to bring on the cause again to a hearing, as they should be advised. The Plaintiffs then added as Defendants certain persons interested under the will; but not all the persons so interested. The new Defendants put in their answers. The Plaintiffs, afterwards, finding that it would be necessary for them to add further parties who appeared on the face of the will to be interested, but whom they had omitted to add under the leave given at the hearing, moved before the Master of the Rolls, on the 25th of *November* 1836, for leave to amend the bill, by stating that the will and codicils of the testator in the cause were executed to pass real estates by devise, and that the same contained devises of real estates, of which the testator was seised, and charges upon the same, and that the testator left one of the two Plaintiffs his heir at law, and by making the children of both the Plaintiffs parties to the suit, and by further stating that those children were

When an order has been made at the hearing, directing that the cause shall stand over, but giving the Plaintiff leave to amend by adding parties, if the Plaintiff, after having added some parties, is desirous to add others, he must apply for further leave so to do; and that application must be made to the Court, and not to a Master.

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 &
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devises under the will, and were interested in and necessary parties to the suit. The Master of the Rolls refused the motion with costs; and at the same time intimated that the Plaintiffs' application should have been made to one of the Masters, under the act 3 & 4 W. 4. c. 94. (a)

The Plaintiffs then made to one of the Masters an application similar to that which had been refused by the Master of the Rolls; but the Master considered that he had no jurisdiction to entertain the application, and therefore refused to interfere; and he gave no costs on either side.

The

(a) The thirteenth and fourteenth sections of this act are as follows:—

Sect. 13. "And be it further enacted, that the Masters in Ordinary of the High Court of Chancery shall hear and determine all applications for time to plead, answer, or demur, and for leave to amend bills, and for enlarging publication, and all such other matters relating to the conduct of suits in the said Court as the Lord Chancellor, with the advice and assistance of the Master of the Rolls and Vice-Chancellor, or one of them, shall by any general order or orders direct, in such manner and under such rules and regulations as by any general order or orders to be also issued by the Lord Chancellor, with the advice and assistance aforesaid, shall be directed; and that it shall be lawful for either party to appeal by motion from the order made on such application,

to the Lord Chancellor, Master of the Rolls, or Vice-Chancellor; and that the order made on such appeal shall be final and conclusive."

Sect. 14. "And be it enacted, that no such application as above mentioned shall in future be heard by any of the Judges of the said Court of Chancery, except on appeal as hereinbefore provided."

The twentieth order of 1835 is as follows:—"That all special applications for leave to withdraw replication, as well as to amend bill, shall be heard and determined by such Master in rotation; and such applications, and all other special applications, under the said recited act, shall be made by taking out a warrant, at the foot whereof a notice shall be written, specifying the object of the application; and the same shall be served two clear days before the return thereof."

The Plaintiffs now moved before the Lord Chancellor, that the order made by the Master of the Rolls, dismissing with costs the Plaintiffs' application to amend the bill, might be discharged, and that the Plaintiffs might be at liberty to amend the bill, by making parties thereto the children of the Plaintiffs, that was to say [naming them], with apt words to charge them, such words being that the said children were devisees under the will of the testator in the cause, and were interested in and necessary parties to the suit, and that the will and codicils of the testator were executed to pass real estates by devise, and that the same contained devises of real estates of which the testator was seized, and charges upon the same, and that the testator left one of the Plaintiffs [naming him] his eldest brother and heir at law.

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&
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Mr. Cooper, in support of the motion.

This is an application for the purpose of giving full effect to an order which the Court has itself pronounced, and the Court therefore is the only jurisdiction which can entertain the present application. The Court has become judicially possessed of the cause. The Master's authority to give leave to amend applies only to a cause not yet in a state to be heard.

Mr. Cankrien, contra.

The application to the Master of the Rolls was very different from the present. His Lordship decided on the fourteenth section of the act. The proposed amendments would raise a new issue. The order of the Master of the Rolls merely directs the Plaintiffs to pay the costs of the motion.

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Mr. Cooper in reply.

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The notices of motion before the Master of the Rolls and before your Lordship, differ from each other only in the arrangement of the parts. As the heir at law is himself one of the plaintiffs, it would not be necessary to go into any evidence to prove the will. The usual order to amend, by adding parties, gives leave to add proper words to charge them.

The LORD CHANCELLOR.

It appears that when the cause came on for hearing, certain parties, not before the Court, were considered necessary parties, in respect of what appeared upon the face of the will; and the usual order was made; and the Plaintiffs added certain parties, but not all the parties who on the face of the will appeared to be necessary parties. The Defendants, however, put in their answers. The necessity of making all these persons parties, ought, of course, to have been known to the Plaintiffs, for their claim proceeds on the will which was the foundation of the suit; but it seems that this necessity did not occur to the Plaintiffs, when the order was acted on by bringing some only of the additional parties before the Court. The Plaintiffs afterwards saw the necessity of making other persons parties.

Now I cannot myself see that this application is within the act of parliament. It is considered as decided that the Court has power to give liberty to amend, when the cause stands over at the hearing (a). The fourteenth section of the act 3 & 4 W. 4. c. 94., provides that the Judges of the Court shall not hear *such* applications as under

(a) See *Milligan v. Mitchell*, *antè*, vol. i. p. 444.

under the thirteenth section, and the general orders to be made upon it, are to be heard by the Master. It may be a question whether those applications are not confined to applications to be made before bringing the suit to a hearing; but it is unnecessary to decide that question; for I consider the Plaintiffs' present application to be, that they may be still at liberty to act on the order made at the hearing, which gave them leave to amend by adding parties. They have acted on that order to some extent, but not to the extent to which it now appears that it was necessary for them to act upon it. They cannot act further upon it without the leave of the Court; and the only question is, whether that leave shall be given. This cannot be a subject upon which the Master can entertain jurisdiction, for he knows nothing of the cause, or of the necessity for leave to amend; and he cannot interfere with the order of the Court by which leave to amend has been already given.

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It is not necessary for me, therefore, to give an opinion upon the construction of the clauses of the act which have been referred to; because I think that the present application grows out of the former leave to amend.

I think that the Plaintiffs should have liberty again to act on the leave to amend, by adding the parties whom they have omitted to add.

But the motion asks that the order of the Master of the Rolls may be discharged. Now I am clearly of opinion that the Plaintiffs, not having made parties all the persons whom it appeared on the face of the will necessary to make parties, must have paid all the costs of their application to the Master of the Rolls for liberty to add the new parties. I therefore need not disturb

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disturb the order of the Master of the Rolls; but the Plaintiffs, upon the terms of paying all the costs of that application and the present, may have liberty to add the additional parties.

Mr. *Cankrien* then asked, on the part of the Defendants, for the costs of the application to the Master; but the Lord Chancellor said that he could not give them, as the Master of the Rolls had sent the parties to the Master.

His Lordship doth order that the Plaintiffs be at liberty to amend their bill, by adding parties thereto, with apt words to charge them, and bring their cause again to a hearing, as they shall be advised; and it is ordered, that the Plaintiffs do pay unto the Defendants the costs of this application, to be taxed by the Master to whom this cause is referred, in case the parties differ: and His Lordship doth not think fit to make any further order on this application.

Reg. Lib. A. 1836. fol. 208.

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1856.
Nov. 28, 29.

THIS was an information and bill filed by the Attorney-General, at the relation of *Thomas Tindal* the treasurer of the county of *Bucks*, and by the relator, on behalf of himself and all other the inhabitants of that county, against four gentlemen who composed a committee of the magistrates of the county of *Berks*, and also against the surveyor of the last-mentioned county, and against three other persons whom the *Berkshire* magistrates had authorised to proceed in the repair or re-construction of the bridge over the river *Thames* at *Datchet*.

Injunction granted, on information and bill, upon the ground of public nuisance, to restrain the magistrates of a county from cutting the timbers supporting the roadway of a bridge, which timbers and roadway, at the place proposed to be cut, were within their jurisdiction, but of which the other extremity was within the jurisdiction of a different county.

The information and bill stated, that there is a bridge over the River *Thames* called *Datchet Bridge*, one end of which is situate in the county of *Bucks* and the other in the county of *Berks*; that in the year 1810, the inhabitants of the two counties were, under an indictment, found liable to the joint repair of the bridge; and that thereupon committees of magistrates were appointed by the justices of the respective counties, to report respecting the bridge to their respective courts of quarter sessions: that at a meeting of the committees in the month of *August* 1810, it was resolved, that it was the opinion of the committees, from the evidence they had examined, that the boundary of the respective counties at *Datchet Bridge* was in the mid-stream of the river *Thames*; and that consequently the expenses to be incurred respecting the bridge should be borne by the two counties in equal proportions: that at another meeting of the committees

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on the 9th of *April* 1811, *Robert Tebbott*, a builder, delivered in a tender in writing to perform all the works required to restore *Datchet Bridge* for 4750*l.*; and that contracts were thereupon entered into, and the bridge repaired by *Tebbot*, pursuant to the order of the Courts of quarter sessions of the two counties respectively, and that the sum of 2375*l.* being one moiety of the expences thereof, was paid by the county of *Bucks.*

The information and bill went on to state the mode in which the bridge was then repaired, being in substance as follows:—The whole of the upper part, forming the roadway of the bridge, was re-constructed of oak timber, and consisted of corbels projecting three feet beyond the face of the piers, and also of nine joists extending over each bay or arch (except in the centre bay, where in consequence of the greater width of the roadway two additional joists were used); the joists were tree-nailed to the corbels, and their ends, which reached to the centre of the piers, were secured by struts. Upon these timbers was laid three-inch oak planking, tree-nailed, and the sides of the bridge were protected with posts and rails. The construction of the centre bay of the bridge, in which was the division of the counties, was similar in principle; but that bay differed from the others in this respect, that one half of it was in each county, the joists reaching from the last pier on the *Berkshire* side of the stream to its opposite pier in *Buckinghamshire.*

The information and bill then stated, that the oak joists extending from pier to pier over the centre bay were paid for in equal moieties by the two counties: that in the year 1834, the bridge being out of repair, the magistrates of *Bucks* appointed a committee of their
 number

number to meet a committee of the magistrates of *Berks*, and make arrangements for repairing it: that the committees could not agree upon the subject; the *Bucks* committee deciding in favour of adopting the plan of 1811, and the *Berks* committee being of opinion that the bridge should be rebuilt and constructed of iron: that finally the magistrates of *Bucks* resolved to repair that part of the bridge which was situated within their own county, as soon as the season of the year would admit: that other meetings, respecting the repairs, were subsequently held between the magistrates of the two counties; but in consequence of the difference of opinion between their respective surveyors they could come to no agreement: that in consequence of such difference of opinion, the Court of quarter sessions, held for the county of *Bucks*, at *Easter* 1836, directed the committee to cause the repairs to be done as speedily as possible; and the clerk of the peace for that county was ordered to communicate such resolution to the clerk of the peace for *Berks*, with a request that the magistrates of the latter county would repair their part of the bridge at the same time: that *William Mosely* was appointed by the magistrates of *Bucks* the surveyor to superintend and direct the repair of their part of the bridge, and that *Charles Parker* was appointed surveyor on behalf of the county of *Berks*: that at the *Bucks Midsummer* quarter sessions for 1836, *Mosely* delivered in his report upon the state of the bridge, together with a plan and estimate of the expense of repairing the same, at the cost of 1366*l.* 10*s.*, by placing an entirely new superstructure of timber on the present piers; but that no agreement could be come to between the magistrates of the two counties or their respective surveyors, as to the centre bay of the bridge (which required joint support from the extreme pier in each county), or upon other matters connected with the repairs; that in consequence of such disagreement, particularly

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particularly as to the centre bay, and the refusal of *Parker*, the surveyor for *Berkshire*, to allow *Mosely* to rest the new joists on the pier in the county of *Berks*, *Mosely*, with the approbation of the magistrates of *Bucks*, altered his intended plan, and instead of laying new joists the whole length across from pier to pier over the centre bay, proposed to lay joists fifty-one feet in length, and continued through from the centre of the bridge to the second pier on the *Bucks* side, and by the leverage so obtained, and by securing their ends to the other timbers by iron ties, and binding them together by means of rod bolts, and also by the assistance obtained by blocking them up from the top of the old oak joists, he proposed to render them secure: that this proposal was adopted; and that the bridge on the *Bucks* side was well and sufficiently repaired according to this plan, the old oak joists, which reached from pier to pier over the centre arch not being disturbed, and the new work on the *Bucks* side being dependent thereon; and that the bridge to that extent is now in a state of thorough repair: that on the 22d of October 1836, the clerk of the peace for *Buckinghamshire* received a copy of an order of the *Berkshire* court of quarter sessions, made on the 18th of October 1836, giving notice of the intention of the magistrates of *Berkshire*, to deprive the *Bucks* side of the bridge of any support from the *Berkshire* side, by cutting the beams on the *Berkshire* side of the centre arch: that no agreement could be entered into with the *Berkshire* magistrates or their surveyor, who threatened to carry into effect the intention of cutting the centre beams: that no diagonal support could be obtained from the pier in the county of *Bucks* on which the joists rest, as such support would interfere with the craftway under the bridge; and that *Mosely* was therefore compelled to adopt the plan of repair already stated: that the threatened cutting

cutting of the old oak joists would, if carried into effect, be a public nuisance, and an invasion of the rights and property of the inhabitants of the county of *Bucks*, and of the public at large: that the Defendant *Parker*, the surveyor employed by the county of *Berks*, and the Defendants, *James Mansfield*, senior, *James Mansfield*, junior, and *George Mansfield*, the builders employed by the *Berkshire* magistrates, would be the persons, or some of the persons, to carry into effect the directions of those magistrates for cutting the old oak joists.

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The bill therefore prayed an injunction to restrain the Defendants, their workmen and agents, from cutting the old oak joists extending from pier to pier over the centre bay of the bridge.

The Vice-Chancellor granted an *ex parte* injunction, and the Defendants, the committee, the surveyor, and the builders, having subsequently filed three general demurrers to the information and bill, the demurrers now came on for argument before the Lord Chancellor.

Mr. Wakefield, *Mr. Jacob*, and *Mr. Teed*, in support of the demurrers.

This suit, in point of form, is novel and unprecedented. The relator and Plaintiff is the treasurer of the county of *Bucks*; but he is not alleged to be a ratepayer, or to have any personal interest in the subject of the suit, or to be acting with the sanction or privity of the county magistrates. The powers vested in the justices at quarter sessions over the bridges within their jurisdiction are particularly fixed, defined, and regulated by a variety of acts of parliament; of which the 22 H. 8. c. 5., 1 Anne, stat. 1. c. 18., 14 G. 2. c. 33.,

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43 G. 3. c. 59., 52 G. 3. c. 110., and 59 G. 3. c. 143. (a) are the most material; and except in a very strong and special case, this Court will not step in to restrain or control the exercise of powers which the legislature has seen fit to entrust, for the benefit of the community, to another court of competent jurisdiction. If any relief can be had in such a case, the proper course would be, to move for a writ of prohibition in the Court of King's Bench; although that Court has always, and most properly, been extremely slow to apply so summary and dangerous a remedy; *The King v. The Justices of Dorset*. (b) The present is really an attempt to have an order, regularly made at quarter sessions by the magistrates of *Berks*, heard by way of appeal in the Court of Chancery. The pretence for interference is, that the order in question, if carried into effect, would occasion or constitute a public nuisance; but there is no ground for such a suggestion. It is the continuance, and not the cutting, of the old oak joists that creates the nuisance; for those joists, as is clear from the conduct of the *Buckinghamshire* magistrates themselves, are in a decayed and dangerous state, and ought to be removed. So long as they remain, it is impossible for the *Berkshire* magistrates thoroughly to repair the bridge, or at least to repair it in any other manner than by yielding up their own opinion, and that of their surveyor, to the opinion of the magistrates of the adjacent county, and acquiescing in the mode of repair adopted by those magistrates, although their own would be far more effectual and durable. Why are the Defendants to give way to the whim or caprice of the magistrates of *Bucks*? That, however,

(a) The acts of parliament on this subject are all collected in *Evans's Statutes*, vol. vii. 102—119.

(b) 15 *East*, 594.

however, will be the necessary effect of maintaining the injunction; for should the *Berkshire* side of the centre bay be left in its present ruinous condition, the injunction could not be pleaded as a defence to any indictment that might be preferred against the magistrates for leaving it in that state.

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Although the bridge was erected in the year 1811, at the joint expense of the two counties, neither can be now said to have any property in the materials which compose it; for the bridge, upon being dedicated to the use of the public, ceased to be the property of individuals; and the two counties are now bound, for the benefit of the community, to keep in repair so much of it as lies within their respective jurisdictions: *Harrison v. Parker (a)*.

Mr. Knight and Mr. L. Lowndes, *contra*, were not called upon by the Court.

The LORD CHANCELLOR.

The question I have to decide is whether the record as it stands (assuming of course every allegation in the information and bill to be correct) does not present such a case as entitles the Plaintiff to come into this Court for relief. In informations and proceedings for the purpose of preventing public nuisances, the ordinary course is for the Attorney-General to take it on himself to sue, as representing the public; but it is equally certain that individuals, who conceive themselves aggrieved, may come forward and ask the assistance of the Court, to prevent a public nuisance, from

(a) 6 *East*, 154.; and see *The* 12 *East*, 192., *The King v. Inhabitants of Bucks*, *habitants of Devon*, 14 *East*, 477.

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from which they have individually sustained damage. (a)

[His Lordship here stated the material allegations and general effect of the information and bill; and proceeded.]

It is said, on behalf of the *Berkshire* magistrates, that they will construct one half of the bridge,—as far as the limits of the county of *Berks* extend,—in an unexceptionable manner; and that I take for granted they would do. But they would then leave one half of the centre bay without any bridge at all: there would be an open space reaching from the *Berkshire* extremity of the bridge to the outermost pier on the *Buckinghamshire* side, and those who had to cross the bridge would be left to pass over that open space as they best might. Nevertheless, that is represented as being the most useful way of carrying the repairs into effect; and it is said that I am not to prevent it, because no nuisance is contemplated. It was strenuously argued that it is not for the magistrates of the county of *Bucks* to complain that the magistrates of *Berks* adopt a particular mode of repair; but surely, it must have struck the counsel who urged that argument, that the magistrates of *Berkshire*, who are assuming this prerogative to themselves, by taking away and destroying that portion of the bridge which the magistrates of *Bucks* are bound to maintain, are virtually compelling the latter to adopt a course in conformity with the views which they themselves entertain.

I know no more effectual mode of interfering with the magistrates of the county of *Bucks* than by telling the *Berkshire* magistrates they are at liberty to cut away the beams

(a) See *Crowder v. Tinkler*, 19 Ves. 617.

beams which support the centre arch, and to leave the magistrates of *Bucks* to repair and rebuild it as they best may. The magistrates of the county of *Bucks* have proceeded (at great inconvenience, no doubt, compared with what would have been experienced if the two counties had acted in concert) to maintain their portion of the centre arch. But it seems to me that the plan which they were recommended to adopt, and which they have, in fact, adopted, was the only one which, under the circumstances, was practicable. That plan was to employ large pieces of timber, projecting over their extreme pier; and so, partly by the leverage and the weight of the timber, and partly by securing the extremities of the timber which projected across the centre arch, and by fastening it to the old oak joints, to complete and secure their portion of the centre arch. The information and bill then states that all this has been done and completed; that the old oak joists have been used for that purpose; that the new timbers are supported by being attached to the old joists, and that in that way the bridge is now in a state of perfect repair and security, as far as the county of *Bucks* is concerned. According to the present proposal, however, instead of the old oak joists assisting to bear up the new timbers which have been "put in by the county of *Bucks*", the magistrates of the county of *Berks* are to cut them through; and so far from the new timbers having then the support of the old oak joists, they would themselves have to bear up those joists, which would no longer have any support of their own. It is not pretended that what has been done by the county of *Bucks*, with respect to the centre bay, can remain or will stand, if any part of the old oak joists is removed. The whole argument assumes that the cutting away of these timbers on the *Berkshire* side will effectually open the whole of the centre bay and compel the county of *Bucks* to adopt some other course of proceeding.

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Now, whether the magistrates of *Berks* are right or wrong in what they propose, this, at least, is clear, that they have, under a regular order at quarter sessions, given a distinct notice (a notice quite sufficient for the purpose of maintaining an injunction) that they intend to adopt this course, if they have a right to do so. Neither can there be any doubt that if their intention is carried into effect, it will occasion a great public nuisance. Why then is the Court, with those two facts so stated on the record, not to interfere to prevent the nuisance to the public? It was argued that there is no appeal from the court of quarter sessions to the Court of Chancery, and that the former court is the only court of competent jurisdiction in such a matter. I am not in the least interfering with the orders of the *Berkshire* court of quarter sessions within their jurisdiction; but what I am doing is to prevent an act of the magistrates of that county which would create a public nuisance in respect of a bridge not within their jurisdiction.

Nobody can dispute that when a bridge becomes dilapidated, or dangerous, the public must submit to the inconvenience of having it shut up for a certain time, in order to have it repaired: but the Defendants' object in cutting away these joists is not to repair the bridge, but that it may remain entirely unrepaired, or open and inaccessible to the public, or that another body of persons, not under their jurisdiction at all, may, in order to escape the penalties of the law for leaving the bridge out of repair, be compelled to concur in constructing in a particular manner that part of the bridge which, according to the argument, is exclusively within the jurisdiction and ought to be subject to the control of the *Berkshire* magistrates. If these two counties have been brought into a difficulty by an act, which was a highly proper act in the year 1811, and which one
 only

only regrets is not the course of proceeding adopted in 1836, namely, a mutual agreement as to the mode in which that work is to be carried on, no doubt it is extremely unfortunate; and the only question is, in what way these parties can exercise their respective rights. But it is the duty of the Court to take care that while these magistrates attempt to exercise their respective rights, the public shall not sustain any injury, and that a public nuisance shall not be occasioned.

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With respect to the question of jurisdiction, it was broadly asserted that an application to this Court to prevent a nuisance to a public road, was never heard of. A little research, however, would have found many such instances. Many cases might have been produced in which the Court has interfered to prevent nuisances to public rivers and to public harbours; and the Court of Exchequer, as well as this Court, acting as a court of equity, has a well established jurisdiction, upon a proceeding by way of information, to prevent nuisances to public harbours and public roads; and, in short, generally, to prevent public nuisances. In *Bor v. Allen (a)*, this Court interfered to stay the proceedings of parties whose jurisdiction is quite as high as that of the court of quarter sessions over bridges, namely, the Commissioners of Sewers. Those commissioners possess a jurisdiction founded on acts of parliament (b), and they have a right, within the due limits of their authority, to do all necessary acts in the execution of their functions. Nevertheless, if they so execute what they conceive to be their duty, as to create or occasion a public nuisance, this Court has an undoubted right to interpose.

(a) 1 *Dick.* 49.

c. 10., and the recent statute,

(b) 23 *Hen.* 8. c. 5. 3 & 4 3 & 4 *W.* 4. c. 22.

Ed. 6. c. 8. 13 *Eliz.* c. 9. 7 *Ann.*

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interpose. The same question occurred in *Kerrison v. Sparrow* (a), before Lord *Eldon*, in which his Lordship, under the circumstances of the case, considered that he ought not to interfere; but the jurisdiction of the Court was not there denied or disputed. In *Attorney-General v. Johnson* (b), the objection to the jurisdiction was attempted to be raised. The defendants in that case, the corporation of the city of *London*, were authorised by act of parliament to do what was necessary to be done in the exercise of their duty as conservators of the river *Thames*; but, in that particular instance, they had assumed to themselves a right to carry on or sanction operations, which created a nuisance to the King's subjects; and the Court accordingly interfered to prevent them from so exercising their undoubted legal powers. To say that this Court, when it interferes in such a case, is acting as a court of appeal from the court of quarter sessions, is any thing but a correct representation of the fact. The jurisdiction is exercised, not for the purpose of overruling the power of others, by way of appeal from their authority, but for the purpose of exerting a salutary control over all, for the protection of the public.

The allegations of fact appearing on the face of this information and bill may be pure fiction; but I am to take the record as it stands, and finding that it represents a case where, if the act proposed to be done be carried into effect, a great public mischief will be occasioned, I think the obvious result of all the authorities is, that I am bound to interfere.

Mr. *Wakefield* then submitted that the demurrer of the Defendants, the surveyor and contractors, ought at all events to be allowed.

The

(a) *Cooper*, 305. 19 *Ves.* 449.

(b) 2 *Wils. C. C.* 87.

The LORD CHANCELLOR (after examining the statements in the information and bill, which referred to the proceedings of the surveyor and contractors), said that in his opinion those Defendants were all so much mixed up and identified with the proceedings of the *Berkshire* magistrates, that they were properly made parties; and that their demurrers also ought to be over-ruled.

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Nov. 22. 28.

THIS was an appeal from an order of Lord *Langdale*, whereby it was declared that according to the true construction of the charter, the master of the college or hospital of *King James*, in the suburbs of *Colchester*, ought to reside in such college or hospital, for the purpose of discharging the several duties of his office; and that it should be referred to the Master to inquire whether there was a fit residence in the college or hospital for such master; and if the Master should find that there was not, then it was declared that such residence ought to be provided, and the Master was to review his scheme with reference to this declaration.

A decree having directed the settlement of a scheme for the regulation of the hospital of *King James* in *Colchester*, and for the future application of its revenues, the Court, in afterwards considering the scheme, came to the conclusion that, upon the true construction of the charter of foundation, and of the laws and statutes of the hospital, it was intended, and was essential to the proper performance

The cause is reported upon the original hearing before *Sir John Leach*, and upon the appeal before Lord *Brougham*, in 2 *Russ. & Mylne*, p. 717., where the substance and object of the information, the letters patent of *King James I.*, and the laws and statutes of the hospital, together with the substance of *Sir J. Leach's* decree, are fully stated.

In of his official duties, that the master should have a proper residence within the hospital, or on the lands belonging thereto; and a reference was accordingly directed for the purpose of ascertaining the best mode of providing such residence; but the Court declined to make any specific declaration that it was the duty of the master to reside, that being a matter falling within the jurisdiction of the visitor.

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In pursuance of Sir *John Leach's* decree, which, in that respect, was not varied on the appeal, the Master made his report, approving of a scheme, the fifth article of which contained the following provision:—"That the master for the time being, in case of his being non-resident or incapable of performing the ecclesiastical duties directed by the charter, shall duly appoint and maintain a sufficient curate for the performance of the said duties, who shall reside there, and that the said master shall allow and pay to such curate the yearly salary or stipend of 75*l.* at the least, by half yearly payments."

The cause subsequently came on at the Rolls, on further directions, when the propriety of this article of the scheme underwent considerable discussion (*a*), and Lord *Langdale* eventually made the order above stated, from which the present appeal was brought.

Mr. *Wigram* and Mr. *Rudall*, for the appeal.


The Master of the Rolls had no power, in the then state of the cause, to make the order under appeal; the matter only came before his Lordship incidentally, on the consideration of the report by which the allowance to be paid to a curate is fixed in case of the Master's non-residence or incapacity to perform his clerical duties. The question with respect to the necessity of residence, was never regularly before the Master or before Lord *Langdale* at all. The information, which was filed in the year 1830, charged, among other things, that the master was non-resident, and lived at *Leominster*; but though the point was thus distinctly raised on the pleadings, no notice was taken of it in the decree made at the hearing, nor was any special reference directed upon the subject.

The

(*a*) 1 *Keen*, 289. where the argument and judgment at the Rolls are fully reported.

The order, besides, is founded on a misconstruction of the language and provisions of the charter. There is nothing in the letters patent or by-laws, which renders the residence of the master imperative. Such of the duties imposed upon him, as would at first sight appear to imply or demand his personal attendance and supervision, are uniformly governed and controlled by a clause authorising their performance either by the master or a sufficient deputy; and it is difficult to imagine any rational purpose which could be served by requiring the master, contrary to what has been the usage of former masters, for a long series of years, to reside upon the spot, and personally to superintend the conduct of the alms-people. It is impossible he should reside in the hospital, indeed, for there is no dwelling fit for his reception within its walls, or even upon the estate. So long as the alms-people have their apartments kept in sufficient repair, and receive their annual allowances of 52s. a year each, they have no ground of complaint; and if the master chooses to manage and superintend the estates and buildings of the hospital by the aid of a receiver and surveyor, for which of course he must pay out of his own pocket, who has a right to object? No one can have so deep an interest in the judicious administration of the property as himself, since he, according to the decree of Lord *Brougham*, which stands unimpeached, is entitled to every shilling of the income, *ultra* the 52s. a year to each of the five poor persons, and the necessary outlay for repairs.

Independently of this objection, the question, if there be a question, ought not to be entertained here. For it is strictly and peculiarly within the province of the visitor of the college, to decide how far, under the circumstances, residence may be proper or obligatory, and to determine the amount of the allowance, which, in the

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the event of his non-residence, the master ought to pay to a curate or deputy, if required. These are all questions especially under the visitor's jurisdiction, with which this Court has no right to interfere. So far, therefore, as they involve matters connected with the master's official situation as head of the college, they are to be settled by the personal interposition of the Lord Chancellor, the visitor specially appointed by the charter; so far as they relate to his ecclesiastical functions, as incumbent of *St. Mary's in Colchester*, they must be regulated by the ordinary. *Case of St. John's College, Cambridge* (a), *Attorney-General v. Price* (b), *Attorney-General v. Middleton* (c), *Attorney-General v. The Earl of Clarendon* (d), *Attorney-General v. Dixie* (e), *The Berkhamstead School Case* (g). Even, however, if the Court had a discretionary power to interpose, the present is not a case in which the Court ought to exercise it. Why should it not be left to the Lord Chancellor as visitor, sitting *in camera*, to dispense with or enforce residence as he shall approve, according to the exigency of times and circumstances? No special case is made to shew that residence is proper, much less indispensable, or that the charity and its property have been in any respect prejudiced, in consequence of the non-residence of the master. No one has addressed any complaint or remonstrance on the subject to the visitor; although, in point of fact, the master has, for a great number of years, ceased to reside in *Colchester*, or its neighbourhood, and no official residence is provided for him there.

Sir *W. Horne* and Mr. *O. Anderdon*, for the relators,
 and the *Solicitor-General* and Mr. *Wray*, for the Crown,
 contended

(a) 4 *Mod.* 235. *Duke*, 245.

(b) 5 *Atk.* 108.


(c) 2 *Ves. sen.* 327.

(d) 17 *Ves.* 491.

(e) 15 *Ves.* 519.

(g) 2 *Ves. & B.* 154.

contended that the order was substantially right, although it had perhaps gone further than was necessary, in directing that a residence should be provided for the master within the precincts of the hospital.

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The LORD CHANCELLOR.

Nov. 28.

The real question raised by the appeal was, whether the master ought or ought not to reside, and whether part of the charity funds ought or ought not to be applied towards providing a residence for him.

The information charged that the master did not reside, but prayed no relief upon that subject; it prayed, however, that a scheme might be approved for the future support and maintenance of the poor.

The Defendant, by his answer, admitted that he did not reside.

The decree, as corrected by Lord *Brougham* upon the appeal, is confined to declaring the right to the 5000*l.* received from the barrack department, and to a scheme for the due regulation of the charity and the management of the estate. The Master, by his report, approved of a scheme, which is silent as to the residence or non-residence of the master of the college; but which provides, by the fifth article, that in case the master shall be non-resident, or incapable of performing his *ecclesiastical* duties (not referring to any duties as master of the college), 75*l.* per annum shall be paid by him to a resident curate, for the performance of those duties.

Upon the cause coming on for further directions at the Rolls, the Court made an order declaring, &c. [His
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Lordship here stated the substance of Lord *Langdale's* order, and continued:—]

In the principle which is the foundation of this declaration and direction of the Master of the Rolls, I entirely agree. I have no doubt whatever that the non-residence of the master is an abuse. I mean, that it is inconsistent with the object of the appointment, and incompatible with the duties of the office. In the reasons I shall give, I do not intend to express any opinion whether the present master may or may not have any sufficient excuse to entitle him to special exemption from this general rule.

The endowment is for the support of the college, and of the master and poor who shall exist and be maintained in the same. The master is appointed, that the property of the college may be better governed and expended. He is to have the cure of souls of *St. Mary's*. He is to celebrate divine service, to preach, and to administer the sacrament, by himself or some sufficient minister, or curate. The poor are to receive 52s. *per annum* each, through the hands of the master of the college or his assignees. He is to have power to elect and remove the poor. The revenues are to be applied for the support of the master and poor of the college, and for the support, maintenance, and repairs of the houses, tenements, and possessions of the college.

By the laws and statutes made in pursuance of the powers given by the charter, the master is to keep and maintain all the houses and buildings of the hospital well and sufficiently repaired, so that they may be fit and convenient *for the habitation of the master and poor*. He is to provide a strong chest, *to stand in the hospital house*

house belonging to the master. The poor are to be obedient to the master; they are not to be absent from their residences, or to take any lodger into their houses, without the licence of the master or his deputy.

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That the authors of this charter, and of these laws and statutes, considered that the master was to be resident, is, I think, abundantly clear. Duties of personal trust and confidence are imposed, and a residence is provided. All this manifestation of intention, however, is said to be superseded, because the charter alludes to the sacrament being possibly administered by some other minister or curate, although it does not allude to any deputy for any other purpose, and because the statutes provide that the master may depute to another the power of giving licence to the poor to absent themselves from their houses.

If any thing were wanting to confirm the evidence of intention that the master should reside, it would be the permitting a deputy to be employed in those two duties only, out of the many which are imposed upon the master. The meaning clearly is, that if the master should be prevented from personally administering the sacrament, he must find another minister to perform that duty, so that, at all events, it may be performed; and that the master may depute to another the power of giving leave of absence, for a day, to the poor, who would otherwise, in the accidental absence of the master, be incapable of leaving their residence. Upon this point I have no doubt, and this is the whole substance of the appeal.

If, then, the master is to reside, it is clear that, in administering the funds, the first object will be to provide a proper residence for him. What has become of the residence

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residence which once existed does not appear, and, indeed, it does not appear that there is not, at this moment, a proper residence. I think, therefore, that the inquiries upon this subject are properly directed; but to enable the Court to act upon the result of those inquiries, I think that the Master should inquire what will be the best mode, and what will be the expense, of providing such a residence, and in what manner, and out of what funds, such expence ought to be borne.

The only doubt I have had upon the order at the Rolls, is with respect to the declaration which prefaces this inquiry; and I think the object may be correctly obtained by some alteration in that part of the order.

This college is a corporation, with a visitor appointed by the charter, who is to inspect and visit the college, and the master and poor, and the state, order, and government of the college. To call the master into residence, if improperly absent, to hear and judge of the excuse he may make for his non-residence, are properly the duties of the visitor.

For this the cases of *Attorney-General v. Middleton* (a), *Attorney-General v. Price* (b), *The Case of Berkhamstead School* (c), are sufficient authorities; and the general rule is assumed in *Attorney-General v. Dixie* (d). It is true, that the declaration of the Master of the Rolls is only introductory to the inquiries respecting the house for the master; but I think it assumes more of the character of a declaration of a duty than is necessary for that purpose.

The

(a) 2 Ves. sen. 327. *Duke*,
 285.
 (b) 3 Atk. 108.

(c) 2 Ves. & B. 134.
 (d) 15 Ves. 519.

The Master has, in his report, confined his scheme, and I think properly, to the distribution of the revenues of the charity; and the reference back, as to the master's residence, does not extend the character of the scheme in this respect.

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Another objection to the declaration is, that the state of the cause hardly authorises it. The cause comes before the Court simply upon the scheme, confined, as I have before said, to the application of the revenues. It was objected that, as the non-residence had been put in issue by the pleadings, and the decree had not taken any notice of it, the Court could not act upon that point on further directions. Had the object of the declaration been to establish a right, or to impose a duty, the observation would, I think, have had much weight; but it is clearly competent to the Court, in settling a scheme, to provide a residence for the master, the Court having come to the conclusion that the duties of the master require his residence.

Another objection to the declaration is, that it throws the obligation of residence upon the construction of the charter, whereas I should rather make it rest upon the nature of the duties to be performed. I think, therefore, that it will be more correct in every respect, and more fair towards the master, to omit the declaration, and to state as the ground of the inquiries, that it appears from the foundation, and from the laws and statutes, that a residence for the master was intended, and that such residence is necessary for the proper performance of the duties of the master; and then to direct the inquiries.

If it be proper that the master should reside, it is obviously a proper application of the funds to provide
 a residence

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a residence for him ; but the Master should, I think, inquire and report what will be the expense of providing a proper residence, and in what manner, and out of what fund, it ought to be defrayed.

The order ought, I think, to be altered in this manner : — “ That the fifth article of the scheme contained in the Master’s report, seeming to assume that the master of the college or hospital might be non-resident, and it appearing to the Court that it was intended by the charter, and by the laws and statutes of the charity, and that it is essential to the proper performance of the duties of the master of the college or hospital, that there should be a proper residence for the master within the college or hospital, or the lands belonging thereto ; let it be referred back to the Master to review his report in respect of the matters aforesaid, and let the Master inquire and state to the Court whether there is in the college or hospital a fit residence for the master ; and in case the Master shall find that there is not, then let the Master inquire in what manner it is proper that such residence should be provided for the master within the college, or upon the lands belonging thereto, and what sum of money it will require to provide such residence, and in what manner, and out of what fund or funds, such sum ought to be raised ; and let the Master state any special circumstances with respect to any of such matters.”

The Appellant has in substance failed in his appeal. He cannot, therefore, have the costs of it out of the fund ; but, under the circumstances, I do not think he ought to pay the costs of the other parties. Their costs must come out of the fund, as the other costs of the cause.

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BETWEEN

JUSTINIAN VERNON - - Plaintiff;

AND

JOHN VERNON, JAMES NEWMAN, and WILLIAM FRASER, WILLIAM MAXWELL ALEXANDER, CLAUD NEILSON, and BOYD ALEXANDER - - Defendants. Feb. 3, 4.

THE bill stated that *John Vernon*, formerly of *Barking* in *Essex*, and of *Vernons* in the Island of *Antigua*, by his will, dated the 30th of *August* 1765, devised all his real estate in *Antigua*, together with the negroes, buildings, Where two inconsistent statements are made in a bill, a Defendant is entitled, upon demurrer, to

adopt that which is most against the Plaintiff's interest.

It appeared by the statements made in a bill, that in *September* 1794, a father, tenant for life, and his eldest son, tenant in tail, of a plantation and slaves, subject to a lease, suffered a recovery, and limited the property to the father for life, with remainder to the son for life, with remainder to the son's first and other sons in tail. The bill then stated, that in the year 1794, not specifying at what part of the year, the lessee removed some of the slaves to a plantation which belonged to himself, and then sold that plantation with the slaves upon it; and that afterwards, while the father was still living, the lessee, having represented to the son that there was some difficulty in distinguishing the slaves which belonged to the settled estate from those which were the property of the lessee, prevailed upon the son to give him a deed of indemnity against his (the son's) claims, in respect of the slaves so removed and sold; and the bill stated that the son was at the time wholly ignorant of the nature and extent of the sale, and of the circumstances stated by the lessee:

Held, that upon these statements, a Defendant was entitled, for the purposes of a demurrer, to infer that the removal of the slaves took place before the month of *September* 1794, and while the son was still tenant in tail; and that the son was cognizant of their removal at the time.

Where a bill had set forth the limitations of a settlement in such manner as to shew that the Plaintiff's father, who was still living, was tenant for life, with remainder to the Plaintiff as tenant in tail; but subsequent parts of the bill had spoken of the father as tenant in tail, and of the Plaintiff as heir in tail: Held, that the Defendant was entitled, on demurrer, to consider that the Plaintiff had merely stated himself to be issue in tail, in which character he would have no right to institute the suit.

A demurrer for want of parties and for want of equity was allowed, and the Plaintiff appealed, but admitted, at the bar, that the bill was defective for want of parties. The Lord Chancellor expressed strong disapprobation of the appeal, as the only question could be whether the old bill should be amended or a new bill be filed.

Amendment permitted in a case in which the Court had reason to believe that allegations, upon the ground of which a demurrer had been allowed, had crept into the bill by accident.

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buildings, and stock thereon, or to the same belonging or appertaining, (subject to and chargeable with the annuities thereafter bequeathed,) to his son *James Vernon*, for life; with remainder to trustees, to preserve contingent remainders; with remainder to the use of *James Vernon's* first and other sons, successively, in tail; with remainder to the use of trustees therein named for the term of 500 years, upon trust to raise 3000*l.* for the daughter or daughters of *James Vernon*; with remainder to the use of the testator's son, *John Joseph James Vernon*, for life; with remainder to trustees, to preserve, &c.; with remainder to the use of the first and other sons of *John Joseph James Vernon*, successively, in tail; with remainder to trustees for 500 years, to raise 3000*l.* for the daughters of *John Joseph James Vernon*; with remainder over in moieties to the daughters of the testator, and their issue; with the ultimate remainder to the testator's right heirs.

The bill then stated, that the testator *John Vernon* died on the 19th of *September* 1765, leaving his two sons, *James Vernon* and *John Joseph James Vernon*, surviving; and that, immediately on the decease of the testator, *James Vernon* entered upon the devised estate, and received the rents; and that afterwards, and on or about the 14th of *August* 1769, *James Vernon* died, without issue, and the estate and premises descended to and became vested in *John Joseph James Vernon*, under the limitations contained in the will; and that he, thereupon, entered upon the estate, and received the rents.

The bill then stated, that by a common recovery suffered before his Majesty's Justices of the Court of Common Pleas at *Westminster*, in pursuance of an act of assembly of the *Leeward Caribbee Islands*, passed in the fourth year of *Queen Anne*, and by indentures of lease

lease and release of the 1st and 2d of *September 1794*, in which the conveying parties were *John Joseph James Vernon* and the Defendant *John Vernon* his eldest son, a certain estate or plantation in *Antigua*, which had belonged to the testator *John Vernon*, and also the following slaves used in the same plantation and thereto belonging, and the issue and increase of the female slaves, that is to say; [here followed the names of the slaves;] and also all and every such other slave and slaves as then belonged to the said plantation, and the progeny of the females, by whatsoever name or names called or known, were limited and settled to the use and intent that the Defendant *John Vernon* should, during the joint lives of his father and himself, receive an annuity of 250*l.*; with a limitation to *Randal Andrews* and *Thomas Wilson*, as trustees, for 700 years, to raise certain sums of money for certain parties therein mentioned; and subject thereto, to the use of *John Joseph James Vernon* for life; with remainder to *William Cross* and *John Santer*, and their heirs, during the life of *John Joseph James Vernon*, as trustees to preserve contingent remainders; with remainder to the use and intent that *Hannah*, the wife of *John Joseph James Vernon*, should receive an annuity of 50*l.* during her life, if she continued so long unmarried; and subject thereto, to the use and intent that *Andrews* and *Wilson*, as trustees, should receive 200*l.* per annum for the brothers and sisters of the Defendant *John Vernon*; with remainder to the Defendant *John Vernon* for life; with remainder to *Cross* and *Santer* and their heirs, as trustees to preserve, &c.; with remainder to the use of the first son of the Defendant *John Vernon* in tail male; with remainder to the use of the second, third, fourth, fifth, and every other son of the body of the Defendant *John Vernon* in tail male, successively; with several remainders over mentioned in the bill; and with the ultimate remainder to

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the Defendant *John Vernon* in fee. The bill stated that the indenture of release contained a power for the Defendant *John Vernon* to grant leases of the premises for any term not exceeding fourteen years; so as no clause in any such lease should give power of committing waste, or exempt from punishment for committing waste.

The bill then stated, that by an indenture of lease, dated the 31st of *January* 1785, and made or mentioned to be made between *John Joseph James Vernon* of the one part, and *Justinian Casamajor* of the other part, after reciting a previous lease by *John Joseph James Vernon* to *Casamajor* of the plantation and slaves, made in 1771, for a term of years which would expire on the 1st of *August* 1784, *John Joseph James Vernon* demised to *Casamajor* all the aforesaid plantation and premises, with their appurtenances; and also all the slaves and cattle mentioned in the schedule thereto annexed, with the issue to be thereafter born and bred of the females of the same slaves and cattle, with the appurtenances; to hold from the 1st of *August* then last, for fourteen years, at the yearly rent of 1500*l.*, and under and subject to the covenants and agreements therein contained, and on the part of the lessee or assignee of the same premises to be kept, observed, and performed.

The bill stated, that it was covenanted and provided by the lease, that *Casamajor* should surrender and yield up to *John Joseph James Vernon*, or the person or persons entitled to the same, such of the thereby demised slaves with their issue, as then were or should be at that time living; and in case of any of the demised slaves dying during the continuance of the term, that *Casamajor*, his heirs, executors, administrators, and assigns should buy other negroes, and place them upon the thereby demised

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mised premises, in the room of those dying, within two calendar months next after the death of the slaves so dying, or as soon after as possible, of the like age, sex, quality, employment, and business, or as near as possible; upon pain of forfeiting to *John Joseph James Vernon*, or the person or persons entitled, double the value of the slaves dying, according to the price mentioned in the schedule; and that *Casamajor*, his executors, administrators, and assigns, should, after the expiration or other sooner determination of the term, surrender and yield up to *John Joseph James Vernon*, or the person or persons entitled to the premises demised, as many of the demised slaves and issue of the females as should be then living, together with such negro slaves as should be purchased and placed upon the demised premises in the room of those dying, together with the issue of such new purchased slaves; and that all the new purchased slaves should be considered as purchased for, and should be duly conveyed to *John Joseph James Vernon*, or the person or persons entitled after his death to the said premises: and that *Casamajor*, his executors, administrators, or assigns, should not, during the term, dispose of, sell, carry off, or attempt to carry off from the Island of *Antigua*, any slave or slaves thereby demised, or any of the slaves so to be purchased, or any of the issue thereof, upon pain of forfeiting to *John Joseph James Vernon*, or the person or persons entitled after his death, double the value of the slaves so disposed of or carried off, over and above the value of such slaves by appraisement, if dead. The lease was stated to contain also an agreement for a new valuation of the slaves at the expiration or other sooner determination of the term, and for payment, on either side, of the amount of any difference between the then value and the present value.

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The bill then stated, that during the continuance of the said several demises or indentures of lease, the number and value of the slaves on the plantation was greatly augmented, both by the issue of those demised with the plantation, and by the issue of such as were from time to time purchased by *Casamajor*, to supply the place of those dying or becoming disabled, pursuant to the covenants in the several indentures of lease contained.

The bill then stated, that all the said slaves, and the issue and increase, as well from the slaves so originally demised, as from those purchased in pursuance of the covenants in the several indentures of lease contained, in the stead of such as were dead or disabled, being either directly descended from the slaves originally belonging to and located upon the estate, or placed in the stead of those dying or disabled, became and were attached to, and a part of the freehold and inheritance of the plantation, and subject to the limitations in the indenture of settlement of the 2d of *September* 1794 contained, and incapable, by the laws of the island of *Antigua*, of being severed from the inheritance, or alienated or removed from off the plantation.

The bill then stated, that by an indenture of lease dated the 1st of *August* 1798, and made between *John Joseph James Vernon* of the one part, and *Justinian Casamajor* of the other part, in consideration of the surrender of the lease of the 31st of *January* 1785, *John Joseph James Vernon* demised to *Casamajor* the before mentioned plantation, and all implements of planting and husbandry, and all the surviving slaves and cattle mentioned in the schedule thereto annexed, being the same schedule as had been annexed to the leases of 1771 and 1785, with the issue already born or thereafter

to

to be born, of the females of the same surviving slaves and cattle, or of the slaves or cattle which had died since the date of the indenture of lease of 1785; and of the slaves and cattle which had been purchased in pursuance of the said indentures of lease, in the stead of those that had died, with their appurtenances; to hold from the 1st of *August* then last, for fourteen years, determinable, as therein mentioned, at the yearly rent of 1600*l.*; and that it was thereby declared and agreed, that at the expiration or other sooner determination of the term, *Casamajor*, his executors, administrators, or assigns, should leave, surrender, and yield up, to *John Joseph James Vernon*, or the person or persons entitled to the premises, 242 negroes and mulatto or other slaves, being the same number as were mentioned in the schedule thereto annexed, to have been upon the plantation at the time of the granting of a certain original lease in the year 1755; which slaves, so to be left, should be of the like ages, sex, condition, employment, business, strength, force, and quality, as those mentioned in the same schedule were at the time of granting the lease of 1755; and the remainder of the negroes, or other slaves who should be upon the said plantation, at the end or other sooner determination of the term, over and above the slaves to be left thereon, should be removed by *Casamajor*, his executors, administrators, or assigns; and that *Casamajor*, his heirs, executors, administrators, or assigns, would, at the end or sooner determination of the term, duly convey the 242 slaves so to be left upon the plantation, or such of them as should not be the slaves upon and belonging to the plantation at the time of the original lease of 1755, and mentioned in the said schedule as the issue or offspring of such last-mentioned slaves, to the trustees of the settlement of the 2nd of *September* 1794, to the uses and upon the trusts limited

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and declared by that settlement, free from all incumbrances.

The bill alleged that the covenant respecting the surrender of the number of 242 slaves, at the end or other sooner determination of the last-mentioned lease, was contrary to the terms, conditions, and limitations, contained in the settlement of the 2d of *September* 1794.

The bill then stated, that previous to the execution of the last-mentioned lease of the 1st of *August* 1798, *that is to say in the year* 1794, *Casamajor* removed a large number, exceeding in amount forty-nine, of the slaves so demised with the estate, and belonging to and located upon and entailed with, the estate of *Vernons*, from off the estate of *Vernons* to another estate called *Hawksbill*, in the island of *Antigua*, then belonging to or in the occupation of *Casamajor*, and placed them on the last-mentioned estate; and that such removal was made without the knowledge, concurrence, or consent, of *John Joseph James Vernon*, and was expressly contrary to, and in direct breach of the covenants contained in the lease of 1785, and to the settlement of the 2nd of *September* 1794, and was an act of waste and spoliation on the part of *Casamajor*.

The bill then stated, that by a lease dated the 31st of *October* 1808, and made between *John Joseph James Vernon* of the first part, the Defendant *John Vernon* of the second part, and *Justinian Casamajor* of the third part, for the considerations therein mentioned, *John Joseph James Vernon* demised, and the Defendant *John Vernon* confirmed, to *Casamajor*, all the plantation, with the slaves and appurtenances; to hold from the 31st of *October* 1808, for the term of fourteen years, at the yearly

yearly rent of 1900*l.*, under and subject to the covenants and agreements therein, and in the lease of the 1st of August 1798, contained, and in the bill before stated.

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The bill then stated, that the slaves so illegally removed from the estate of *Vernons* by *Casamajor*, were not brought back thither, but continued and were located upon the estate of *Hawksbill*; and that the number and force of the slaves was greatly increased by the breeding of the females.

The bill further stated, that on the 29th of *November* 1813, *Casamajor* contracted with *Christopher Punnett*, of the island of *St. Vincent*, merchant, for the sale to him of the plantation of *Hawksbill*, together with 108 slaves, including and comprising the slaves, with their issue, or the survivors of the slaves or their issue, so removed from off the plantation of *Vernons* by *Casamajor*, and placed by him upon the plantation of *Hawksbill*, or their offspring, and the issue of such as were dead. And the bill then stated a deed of the 7th of *December* 1815, by which the estate of *Hawksbill* and the 108 slaves were conveyed to *Punnett* in fee.

The bill further stated, that some time after the sale, *Punnett* caused the slaves so placed on the plantation of *Hawksbill* by *Casamajor*, and so sold therewith, with their respective issue, or the survivors of such slaves and their respective issue, and the issue of such as were deceased, to be removed from off the estate of *Hawksbill*, and placed on an estate called *Mustique* in *St. Vincent's*, then belonging to and in the possession of *Punnett*; and that the slaves so removed from off the estate of *Hawksbill*, and placed on the estate of *Mustique*, became located on, and that they, or the survivors of them, with their issue, and the respective
 issue

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issue of such as are deceased, are now, and have ever since the said removal, been located on and formed part of the estate of *Mustique*.

The bill then stated, that *Casamajor* continued in the possession and occupation of the plantation called *Vernons*, and in receipt of the produce and profits thereof, under the last-mentioned lease, until the time of his decease, which took place on or about the 13th of *June* 1820, having first made his will, dated the 2nd of *September* 1816, and thereby appointed *James Newman*, and three other persons mentioned in the bill, his executors; and that his will was, on the 29th of *August* 1820, proved in the proper ecclesiastical court by *James Newman*, who alone acted in the trusts thereof.

The bill then stated, that *John Joseph James Vernon* died on the 23d of *September* 1823, and that he left the Defendant *John Vernon*, his eldest son, and *heir in tail in remainder* of the said plantation and premises under the indenture of settlement of the 2d of *September* 1794; and that thereupon the Defendant, *John Vernon*, became possessed of and entitled to the estate, plantation, and premises, subject to the indenture of lease of the 31st of *October* 1808, and to the receipt of the rents and profits thereof.

The bill further stated, that shortly after the death of *Casamajor*, *James Newman* alleged and represented to *John Vernon*, that there were doubts as to the identity of divers of the slaves on the plantation, and alleged, contrary to the fact, that it might be that some of the slaves then upon the estate were the inheritance of *Casamajor*; and that the identity of many of the slaves could not be ascertained; and that upon such representations and allegations, *Newman* persuaded the
Defendant

Defendant *John Vernon*, as heir apparent of *John Joseph James Vernon*, and during the life of *John Joseph James Vernon*, to execute to him, *James Newman*, a deed of indemnity against the liabilities and claims of him, *John Vernon*, in respect of the slaves so removed and sold to *Punnett*, and on account of which the real and personal estate of *Casamajor* might become liable and answerable.

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The bill then stated, that the deed of indemnity was made on the 27th of *October* 1821, between the Defendant *John Vernon* of the one part, and *James Newman* of the other part; and that *John Joseph James Vernon* was neither a party to, nor acquainted with the terms and conditions of the deed; and that the same was wholly without the knowledge, consent, or concurrence of *John Joseph James Vernon*.

The bill then stated, that the Defendant *John Vernon* was, at the time, wholly ignorant of the nature or extent of the sale, or of the circumstances stated and alleged by *Newman*; and that he concurred and consented thereto, solely on the representation and request of *Newman*.

The bill then stated, that *Punnett* was abroad, beyond seas, and in the island of *St. Vincent*, out of the jurisdiction of the Court; and that *William Cross* died in the life-time of *John Santer*, and that *John Santer* had since died; and that the Plaintiff was unable to discover who was his heir at law.

The bill then stated, that under the act of parliament for the abolition of slavery (a), *Punnett* had lately preferred

(a) 5 & 4 W. 4. c. 75.

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ferred a claim before the commissioners for awarding compensation under that act, for all the slaves on the estate called *Mustique* in *St. Vincent's*, including the survivors of the slaves so removed by *Casamajor* from off the estate of *Vernons*, and placed on the estate of *Hawksbill*, and sold in manner aforesaid to *Punnett*, and their issue and offspring, and the issue and offspring of those that are, since the said sale, deceased.

The bill then stated, that *William Fraser, William Maxwell Alexander, Claud Neilson, and Boyd Alexander*, of *London*, merchants, trading as *Fraser, Alexander, Neilson and Co.* claim to have some estate, right, or interest, in the estate of *Mustique*, by virtue of some mortgage or other security made to them by *Punnett*, long subsequent to the purchase by him from *Casamajor* of the negro and other slaves thereinbefore particularly mentioned, the nature and particulars whereof they refuse to discover; and that *Fraser, Alexander, Neilson and Co.*, claim to have some interest, in respect of the said mortgage or other security, in, or title to, the money to be awarded under the provisions of the aforesaid act of parliament, in lieu and compensation for the negro and other slaves upon the estate of *Mustique*.

The bill further stated, that the Plaintiff is the *eldest son and heir apparent in tail*, of the Defendant *John Vernon*, and as such, entitled under the settlement of the 2nd of *September 1794* to the said plantation, estate, and premises in remainder, immediately expectant on the decease of his father, the Defendant *John Vernon*, together with the negroes and other slaves thereon, or to such compensation for the same as should be awarded by the commissioners, and to have the same secured for the benefit of the inheritance of the said plantation, estate, and premises.

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The bill then stated, that the Plaintiff had only lately discovered the circumstance of the removal and sale to *Punnett*; and that since such discovery, the Plaintiff had frequently applied to *Punnett* to restore all the slaves so illegally removed and sold by *Casamajor*, and afterwards removed and carried away by *Punnett*, or the survivors of such slaves and their issue, and the issue of such as were dead, and to account for their value; and that the Plaintiff had also applied to *Fraser, Alexander, Neilson and Co.*, to withdraw their claim upon or in respect of the said slaves, or to discover the nature and title thereof.

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The bill charged that *Punnett* duly signed a certain return, containing an account and description of all the slaves belonging to him, dated the 6th of *June* 1817, and made in pursuance of the act of parliament of the 47 G. 3., for the abolition of the slave trade, wherein he enumerated and described all the slaves on his estate at *Mustique*, therein called the *Cheltenham* estate; and that that list or return comprised the following of the slaves so illegally sold and conveyed with the plantation and estate of *Hawksbill*, by *Casamajor* to *Punnett*, and removed by him from *Hawksbill* to *Mustique*, viz. [here followed the names].

The bill then charged, that the remainder of the slaves comprised in the indenture of the 7th of *December* 1815, and mentioned or included in the return so made by *Punnett*, were deceased, or had been removed with their issue by *Punnett* from off the estate at *Mustique*; and that such removal was made secretly and fraudulently, and without the knowledge or consent of *John Joseph James Vernon*.

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The bill then charged, that the removal of the slaves was contrary to, and in direct breach of the covenant in the lease of the 31st of *January* 1785, and was a fraud upon *John Joseph James Vernon*, and that he was ignorant of, and did not know, at the time of executing the leases of the 1st of *August* 1798, and the 31st of *October* 1808, or at any time after, that such removal of slaves from *Vernons* had taken place; and that the Defendant *John Vernon* was *only tenant for life*, expectant on the decease of *John Joseph James Vernon*, of the said estate, plantation, and premises, under the settlement of the 2nd of *September* 1794, and had no power or authority to consent to, or concur in the removal, or to confirm or acquiesce in the same.

The bill then charged, that the sale of the slaves so removed, or their issue, was wholly illegal and void, and that the same ought now, as far as regards the said slaves, to be annulled and set aside; and that both *Casamajor* and *Punnett* well knew that the sale was fraudulent and illegal.

The bill then charged, that *John Joseph James Vernon* was induced and persuaded to execute the lease of the 1st of *August* 1798, and to concur and agree in the covenant therein, for the restoration of only 242 slaves, upon the allegation, then made by *Casamajor*, that all the slaves above that number were his property, and had been purchased by him, which was contrary to the fact, such slaves being either the increase and issue of the slaves originally upon the said estate and plantation, or the issue and increase of those bought in the room and stead of those which had died or become disabled, pursuant to the covenant contained in the lease of the 31st of *January* 1785.

The

The bill then charged, that the covenant in the lease of the 1st of *August* 1798, for the restoration of 242 slaves, at the end or other sooner determination of the term of fourteen years, was wholly illegal and void, both at law and in equity; and that all the slaves which were born or brought upon the estate, during the several demises to *Casamajor*, and the issue thereof, became and were attached to, and a part of the freehold and inheritance thereof, and were incapable of being legally severed or taken therefrom.

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The bill further charged, that the covenant contained in the lease of the 31st of *January* 1785, expressly provided and declared, that no removal of any of the slaves on the estate should take place before the end or sooner determination of the term thereby granted, or without the same being surveyed, valued, and appraised, in manner therein mentioned; and that the sale to *Punnett* by *Casamajor*, was in breach of and contrary to that covenant, and therefore void and illegal.

The bill then charged, that no such valuation or appraisement did or hath ever since taken place, as was so covenanted and agreed on, by and between the parties to that lease; and that the deed of indemnity of the 7th of *October* 1821, was only personal, and could not bind the Plaintiff's interest or the inheritance of the estate.

The bill lastly charged, that *Punnett*, and *Fraser*, *Alexander*, *Neilson* and Co., ought to be enjoined from receiving any of the money to be awarded in compensation for, or in respect of the several slaves on the estate at *Mustique*.

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The bill prayed, that the deed of the 7th of *December* 1815, so far as respected the conveyance and assignment of the slaves therein specified and comprised, might be declared by the Court to be fraudulent and void, against the Plaintiff, and the inheritance of the estate of *Vernons*, and that the same might be decreed to be set aside; and that an account might be taken of the slaves residing, attached to, or located upon the estate of *Hawksbill*, at the date of the sale thereof by *Casamajor* to *Punnett*, and of their value at the time of such sale; and that an account might be also taken of all the issue of the slaves so sold by *Casamajor* to *Punnett*, as well those deceased as those surviving; and that a like account might be taken of the slaves removed from the estate of *Hawksbill* by *Punnett*, or by his order, or on his account, and placed on the estate of *Mustique* in *St. Vincent's*, and of their issue; and that a like account might be taken of the slaves now remaining, or which were remaining at the time of the passing of the aforesaid act of parliament, upon, or were claimed by *Punnett* as belonging to, the estate of *Mustique*; and that the full and actual value of all such slaves so purchased from *Casamajor*, with the estate of *Hawksbill*, and their issue, and the value of the slaves so subsequently removed by *Punnett* from the estate of *Hawksbill*, and placed upon the estate of *Mustique* in *St. Vincent's*, and their issue, and the like value of the slaves now remaining upon or claimed by *Punnett*, at the time of the passing of the act of parliament might be ascertained; and that the full amount thereof, when ascertained, might be declared by the Court to belong to and form part of the inheritance and possession of the estate of *Vernons*, and might be directed to be paid to the Plaintiff, or secured for the benefit of the person or persons entitled to the possession of the estate of *Vernons*, and the inheritance thereof;

thereof; and that all sums of money now awarded, or to be hereafter awarded, to *Punnett*, in compensation for any of the slaves which, at the time of the passing of the said act, were located upon the estate of *Mustique*, and were claimed as belonging to *Punnett*, might be declared to belong to and form part of the estate of *Vernons*, and might be directed to be paid to the Plaintiff, or secured for the benefit of the person or persons entitled to the possession and inheritance thereof; and that *Fraser, Alexander, Neilson and Co.*, might be restrained by injunction from the further prosecution of the claim made by them before the commissioners of compensation, in respect of any sum or sums to be awarded to *Punnett*, in lieu and satisfaction of the slaves on the estate of *Mustique*.

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The bill prayed process against *John Vernon, James Newman*, and *William Fraser, William Maxwell Alexander, Claud Neilson*, and *Boyd Alexander*.

The Defendants *Fraser, Alexander, Neilson and Co.*, demurred to the bill for want of parties, and also for want of equity. The parties pointed out by the demurrer, as being necessary, were *Punnett*, and the trustees *Andrews and Wilson*. The Master of the Rolls allowed the demurrer, generally. The Plaintiff now appealed from that decision.

Mr. Wigram and *Mr. E. F. Moore*, in support of the appeal.

It must be admitted, that as the bill at present stands, *Andrews and Wilson* are necessary parties. By amendment, however, the necessity of making them parties will be removed, because it will be alleged, that the term vested in them has ceased. It is to be observed,

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that *Punnett* is charged to be out of the jurisdiction; and there are authorities which shew that it is not necessary to pray process against him when he shall come within the jurisdiction; *Haddock v. Thomlinson.* (a)

The record does not exhibit any defect of which the Defendants can take advantage, by way of general demurrer. The Master of the Rolls said, that every intendment is to be made against the pleader; and that therefore it may be intended, that the removal of the slaves, which is alleged to have taken place in the year 1794, took place before the month of *September* in that year; and that as *John Vernon* was then tenant in tail, he may have excluded those slaves from the settlement; and the sole ground of the Master of the Rolls's judgment was, that on all the allegations taken together, it was to be inferred that it was the intention of the parties to that settlement, that those slaves should be, and that, in point of fact, they were excluded from it. The Master of the Rolls said, that it was to be presumed that *John Vernon* did know of the removal of the slaves. His knowledge, however, is not to be inferred from the absence of an allegation that he did not know: he was not in possession; he was only a remainder-man; and therefore even if he did know of the removal, why should he complain? he does not appear to have been resident on the island; for the recovery was suffered here; and, indeed, all parties would seem to have resided here. The settlement, in express terms, included all the slaves belonging to the estate; and if it had been intended to except those which had been removed, such intention would have been mentioned. The bill describes the slaves removed as having been those demised by the lease, and as belonging to and located on, and entailed

(a) 2 Sim. & Stu. 219.

entailed with the estate. It will be observed, also, that the description of the parcels (including the slaves), is exactly the same in the lease of 1798, as it had been in the leases made before 1794; and it is a singular circumstance, that in every succeeding lease the rent is increased.

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But even if *John Vernon* did know of the removal, what would that signify, if *John Joseph James Vernon* did not know of it? The agreement to except those slaves, if there had really been any such agreement, must have been an agreement on the part of both; and if it had been intended to confirm the acts done by *Casamajor*, he would have been a party to the deed. The Master of the Rolls seems to have thought, that although it is positively averred, that *John Joseph James Vernon* did not know of the removal, yet that, from the subsequent allegations, it might be inferred that he did know. If such inferences are to be drawn, notwithstanding positive averments, there will be an end of all pleading.

There is no presumption that the remainder-man knows how the tenant for life is managing the estate. The reason for confining to *John Joseph James Vernon* the charge of ignorance of the removal, was that he was the tenant for life in possession, and might otherwise, perhaps, have been presumed to know of it; but that supposition cannot apply to the remainder-man. Nothing that either *John Joseph James Vernon* or *John Vernon* did, after the year 1794, can have any bearing upon the present question. The Master of the Rolls, throughout his judgment, admitted the necessity of shewing that both knew of the removal; but he said that he thought much credit was not to be given to the statements in the bill. To enter, however, upon demurrer,

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into the credibility of the allegations made in a bill, would entirely subvert the old rules of pleading, and introduce a new one; and, indeed, the rule that everything is to be presumed against the pleader, applies to statements, not in a bill, but in a plea. *Brownson v. Edwards.* (a)

It is true that a long time has elapsed since the removal of the slaves; but *John Joseph James Vernon* died only recently, and *John Vernon* is still living; and, in point of law, the length of time which has elapsed makes no difference, because the remainder-man has no right to interfere until the death of the tenant for life, unless there is a fraud on the part of the lessee. The bill charges, that this fraud has been lately discovered by the Plaintiff; that must mean, that the discovery has been, at all events, within twenty years; and in cases of fraud, the time runs from the date of the discovery. *Booth v. The Earl of Warrington* (b), *Randall v. Errington* (c), *Hovenden v. Lord Annesley* (d), *Blennerhasset v. Day* (e), *Lord Arran v. Lord Tyrawley.* (g) At law, also, the rule is, that time runs only from the date of the discovery of the fraud; but as the rule of pleading is, that the fraud must be replied specially, there is some confusion in the cases. The recent Limitation Act, 3 & 4 W. 4. c. 27. s. 26., expressly reserves the same right, and is a legislative declaration that there was no intention to alter the law.

Sir *William Horne*, Mr. *James Russell*, and Mr. *Lewis*, in support of the demurrer.

The

(a) 3 Ves. sen. 245.

(b) 4 Bro. P. C. 163.

(c) 10 Ves. 423.

(d) 2 Sch. & Lef. 607.

(e) See 2 Ba. & Be. 129.

(g) Cited 1 Ba. & Be. 170.

The statement that *Punnett* is out of the jurisdiction, is not sufficient to obviate the necessity of praying process against him, when he shall come within the jurisdiction; and the demurrer, for want of parties, is, on that account, good; *Windsor v. Windsor* (a), *Taylor v. Fisher*. (b) *Punnett*, moreover, is the substantial Defendant in the cause, and no decree can be made in his absence; for the bill seeks to have the conveyance to him set aside.

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Although the limitations stated to be contained in the settlement of 1794, would make the Defendant *John Vernon* only tenant for life, yet it is distinctly averred that he was tenant in tail; and that averment being less favourable to the Plaintiff than the previous statement, the demurring Defendants are entitled to disregard the previous statement. It is averred also that the Plaintiff is heir in tail of *John Vernon*, which, of course, implies that *John Vernon* was tenant in tail. The Defendants are entitled to consider the bill as having throughout stated *John Vernon* to be heir in tail. The bill does not sufficiently shew that the slaves comprised in the settlement of 1794, were those which had been demised by the lease of 1785. No slaves could have been included in the settlement but those which had passed by the will; for the slaves which had been since purchased, were the legal property of the lessee, who was only bound by a covenant to convey them eventually to the lessor. There has been a clear adverse possession for more than forty years; namely, since 1785. *Lord Arran v. Lord Tyrwaley*, and *Randall v. Errington*, were cases of purchases by trustees from *cestuis que trust*, in which it is a known rule, that time is no bar; *Booth v. The Earl of Warrington* was a case of gross fraud. In *Blennerhasset v. Day*,

(a) 2 *Dick.* 707.

(b) *Rolls*, April 16. 1835.

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this appeal has cost, would not have been unnecessarily incurred, if the real merits of the case had been under discussion; but they have been very unnecessarily incurred upon such a question as that which alone is now before the Court.

Attending to the allegations contained in the bill, and adopting the rule of the Master of the Rolls, that where a Plaintiff states a fact in his bill in one way, and in a subsequent part of the bill makes the same statement in another way, the Defendant is entitled to take that statement which is most against the interest of the party making it, I think there are two grounds upon which this general demurrer must be allowed. The bill alleges, that at one time previously to the month of *September* 1794, there were a tenant for life and a tenant in tail; then that, in the year 1794, not mentioning at what part of the year, the removal of the slaves took place, which is treated by the bill as unlawful, and is called an act of spoliation, and, therefore, an act which the Plaintiff cannot ask the Court to assume was immaterial. There is no allegation that *John Vernon* was not a party to this act, nor that the act was not done anterior to *September* 1794; but there is an allegation which, although not amounting to proof that he was privy to the act, may, upon demurrer, be taken to explain the absence of an allegation to the contrary; namely, the indemnity given by *John Vernon*, which it would have been very extraordinary for a tenant for life to give, from whose estate the slaves had been removed without his knowledge. The fact being, (as the bill alleges at least,) that the Defendant removed these slaves, and sold the estate together with the slaves; and that he did so fraudulently, and that he received the value; and it is alleged that, in 1821, it being supposed that the lessee's estate was

not

not secure, the tenant for life indemnified the lessee against all claims to be made by him in respect of the slaves removed and sold.

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This is a very singular allegation, if *John Vernon* was not cognizant of the fact of the removal of the slaves. Whether he was or not, is perfectly immaterial for the present purpose. I find an allegation, that *John Joseph James Vernon* was not cognizant of their removal; and none that *John Vernon* was not cognizant of it; but an indemnity afterwards given by him. So far from its being alleged that he was ignorant of it, there is very strong reason to suspect he did know of it. Well, if he did, the slaves are stated to have been removed in 1794, and being tenant in tail, (though I think there is a sufficient allegation that the father did not know,) he is party to a recovery, and a settlement founded upon that recovery, by which the slaves then belonging to the estate are settled. If, therefore, he had been privy to the removal of the slaves while he was tenant in tail, neither he nor any person claiming title under him could ever claim them.

Now, all this may be quite contrary to the fact, but I am only taking the allegations in the bill for the purpose of trying the materiality of *John Vernon's* knowledge, and of the absence of any allegation that he did not know.

The Master of the Rolls appears to have come to a conclusion as to *John Joseph James Vernon's* knowledge, in which I do not entirely follow him; for I think that there is a sufficient allegation that *John Joseph James Vernon* did not know. For the present purpose, however, it is sufficient to say that I agree with the Master of the Rolls as to the knowledge on the part of *John Vernon*,

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Vernon, the tenant in tail; and that is one ground upon which I think the general demurrer must be allowed.

I do not at all dispute that the identity of the slaves is made out upon the statements in the bill; and I think that sufficient is stated to shew that the slaves included in the lease of 1785 became the subjects of the settlement of 1794, and also of the leases of 1798 and 1808; and that the same slaves, or, at least, some of them, became the subjects of the various subsequent dealings mentioned in the bill.

The bill states the settlement of 1794; according to the terms of which, as stated in the bill, the Plaintiff would be tenant in tail, and the Defendant *John Vernon* would be tenant for life. For the purposes of demurrer, you must, undoubtedly, take the representation of the contents of a deed which is made by the bill to be true. By this settlement then, as the bill states it, the Plaintiff is tenant in tail, as eldest son of the Defendant *John Vernon*.

Then comes this allegation, viz. that *John Joseph James Vernon* left the Defendant, *John Vernon*, his eldest son and *heir in tail* in remainder under the settlement. Now, according to the statement of the settlement which is made in the bill, he would not be *heir in tail* in remainder, but second tenant for life.

Here then is a bill which states a settlement, under which a person would be tenant for life in remainder, expectant on a previous life estate; and then afterwards there comes a statement, that under the settlement, not as set forth in the bill, that person became heir in tail in remainder; stating that to be the result of the settlement, and not as a mere legal deduction from the settlement

as set out in the bill. But it does not rest there; that might be a mistake in the copying or otherwise: the Plaintiff goes on, and states his own title, not as first tenant in tail by way of purchase, which would be his title under the terms of the settlement as before set out in the bill, but he states that he is himself the eldest son and heir apparent in tail.

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How can the Court assume, after these statements, that the Defendant *John Vernon* is tenant for life, and that the Plaintiff is the first remainder-man in tail? These statements assume that there is an estate of inheritance in *John Vernon*, and that the Plaintiff is his heir in tail. It is twice stated as a fact that *John Vernon* is tenant in tail, and that the Plaintiff is issue in tail. If that be so, there is an end of the case, for *John Vernon* is, at this moment, tenant in tail, and the Plaintiff is only issue in tail, and has no right to file this bill.

Then again, it would be intelligible enough that *John Vernon* should give the indemnity to which I have before referred, if he was tenant in tail.

Thus there is a sufficient doubt left by the Plaintiff, to prevent his being entitled to attribute these two statements to mere accident, and to take the benefit of his former statement of the terms of the settlement.

If I am bound, in consequence of the loose statements in the bill, to assume the fact to be either one way or the other, then the rule applies, which entitles the Defendant to put that construction upon the statements in the bill, which is most against the interest of the person making them.

If

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If I were to overrule this demurrer, I must assume three things: first, I must assume that the slaves were removed subsequently to the settlement of 1794, which is not alleged to be the case; secondly, I must assume that the slaves were removed without the privity of *John Vernon*, which is not alleged to have been the case; and, thirdly, I must assume that the terms of the settlement are correctly set out in the bill, and that the two passages which I have read from the bill, and which are inconsistent with the statement previously made of the terms of the settlement, have been inserted by mistake; but these assumptions I cannot make. The appeal must therefore be dismissed with costs.

Mr. Wigram, at the conclusion of the Lord Chancellor's judgment, applied for leave to amend; and urged that the ground taken by the Master of the Rolls in his judgment, had not been supported by the judgment upon the appeal. *Mr. Lewis* opposed the application; but the Lord Chancellor said that he had reason to believe, that the allegations upon the ground of which he had been obliged to allow the demurrer, had crept into the bill by accident, and that in such a case the Court was in the habit of giving leave to amend. Leave to amend was therefore granted.

1837.

MORTIMER v. FRASER.

Jan. 30.
Feb. 1, 2.

IN this case, one of the Defendants filed a demurrer to the bill; and for cause of demurrer shewed, first, want of equity; secondly, that the matters in question had already been decided in a suit still depending; thirdly, that all the relief sought by the bill might be had in another suit still depending; and, fourthly, that the bill had been filed after a petition for leave to file it had been dismissed. The Defendant also demurred, *ore tenus*, at the bar, for want of parties. The Vice Chancellor overruled the demurrer upon record, with costs; but allowed the demurrer *ore tenus*, without costs, and gave the Plaintiff leave to amend generally.

When a Defendant puts a demurrer on record, and also demurs *ore tenus*, if the demurrer on record is overruled, but the demurrer *ore tenus* is allowed, the Defendant must pay the costs of the demurrer on record, unless the Court, at the time, makes other order to the contrary; and, *semble*, the Court will not be disposed to make such other order.

The Defendant appealed from his Honor's decision, upon the ground that the demurrer on record ought to have been allowed with costs, and also that liberty to amend ought not to have been given, or if given, should have been given only on the terms of the Plaintiff paying the costs of the demurrer.

The LORD CHANCELLOR, after hearing Mr. Jacob and Mr. Daniell in support of the appeal, and Mr. Knight and Mr. Koe in support of the Vice Chancellor's order, was of opinion that his Honor was right in overruling the demurrer upon record, and that the Plaintiff ought to have leave to amend. Mr. Jacob and Mr. Daniell then argued that it was the constant practice, that if a demurrer on record was overruled, but the demurrer *ore tenus* was allowed, each party paid his own costs of the demurrer on record; and they further insisted that it had been decided in the case of *Newton v. The Earl of Egmont*,

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Egmont (a), and that it was the practice of the Court, that whenever, after a demurrer *ore tenus* for want of parties had been allowed, a plaintiff was desirous of amending his bill more extensively than by merely adding parties, the plaintiff must pay the costs of the demurrer. They admitted, however, that when that case was cited to the Vice Chancellor himself, his Honor said he did not intend to lay down any general rule upon the subject.

The LORD CHANCELLOR.

I have made some inquiries as to the course of the Court, since the new orders, in cases in which the demurrer on the record is overruled, but a demurrer *ore tenus* allowed; and the Registrars do not seem to have formed any conclusive opinion upon the subject. According to my own recollection, the practice before the new orders was, that in such a case the Court gave no costs on either side; but I think it is extremely difficult to get over the language of the thirty-second order of 1828, which provides, "that upon the overruling of any plea or demurrer, the defendant or defendants shall pay to the plaintiff or plaintiffs the taxed costs occasioned thereby, unless the Court shall make other order to the contrary." It is not said now that the Court below made any other order to the contrary; and if so, I do not see how the court of appeal is to make any order. The thirty-second general order is imperative. The Defendant's application to be relieved from the payment of the costs of the demurrer on record, should have been made to the Court below, at the time at which the demurrer *ore tenus* was allowed. Indeed, I cannot say that I have any disposition to depart from what appears to

to be the consequence of that general order; for if a Defendant puts one ground of demurrer on record, and fails on that, and then insists upon another ground of demurrer at the bar, how is the Plaintiff to know what he is brought into Court to answer? For instance, if the demurrer put on record in this case had been a demurrer for want of parties, the Plaintiff might have set himself right at once by amendment; instead of which he is brought into Court to argue against a demurrer for want of equity. Is the Defendant to escape from the costs of that improper litigation, of which he has given notice?

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I think this case is strictly within the thirty-second general order, and I see no reason for making any special order. The appeal must therefore be dismissed with costs.

The following note of precedents upon the subject was furnished to the Lord Chancellor by Mr. Fry, the senior registrar.

"Ballentine v. Rust, 14th June 1820. A.1819. fo.1650. Demurrer filed; overruled with 5l. costs; and demurrer ore tenus, for want of parties, allowed without costs; the Plaintiff to be at liberty to amend his bill as he shall be advised.

"Lales v. Meddowcroft, 30th June 1824. Demurrer as to equity overruled; but demurrer ore tenus, for want of parties, allowed; and the Plaintiff to be at liberty to amend his bill, on payment of 20s. costs.

"Practical Register, 163. 3 Peere Williams, 371. Not the practice that the Defendant should pay the costs of the

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the demurrer on record overruled, when demurrer at bar allowed; but he is not to receive his costs.

“*Dickens*, 97. Demurrer to bill for perpetuating the testimony of witnesses and for relief; and at the bar for want of parties. Demurrer at bar allowed.

“*Dickens*, 510. Demurrer filed; held, on argument, not good; and a demurrer at bar good; the Defendant is not to have costs.

“*Newton v. The Earl of Egmont*, 3d November 1831. 4 *Simons*, 574. If on a demurrer *ore tenus*, for want of parties, the Plaintiff wishes to have permission to amend his bill more extensively than by merely adding parties, he must pay the costs of the demurrer.

“Order of Court of 3d April 1828. Rule 32.” (a)

(a) In *Attorney-General v. Brown*, (see 1 *Swanst.* 288.) Lord *Eldon* said, “If a Defendant cannot sustain the demurrer on the record, he is entitled to demur *ore tenus*; but, availing himself of that right, he must pay the costs of the demurrer on the record.”

1836.

DAVENPORT v. WHITMORE.

1856.
Dec. 2, 3, 15.

THE bill stated that the Plaintiff being heretofore owner of three fourth parts or shares of a ship called the *Wellesley*, made an equitable mortgage of his said shares to the Defendants *Whitmore* and Co., for securing to them 2800*l.* and interest, by depositing with them the bill of sale to the Plaintiff of his said shares. That the Plaintiff afterwards, in the latter end of the year 1831, executed to the Defendants a legal mortgage of his aforesaid shares by bill of sale, for securing their mortgage debt and interest. That in the month of *February* 1832 a *fiat* in bankruptcy was issued against the Plaintiff, under which he was found a bankrupt; and that the Plaintiff afterwards duly obtained his certificate and thereby became discharged from all the debts due from him at the time of such bankruptcy. That the ship *Wellesley*, including as well the Plaintiff's shares as the remaining fourth thereof, which belonged to another owner, was afterwards put up for sale, when the Defendants purchased the entirety of the ship for the price of 1000*l.* That the Plaintiff, at the time of his bankruptcy, was indebted to the Defendants exclusive of his mortgage debt; and that the Defendants proved under the *fiat* a debt of 3414*l.* without taking into account or proving such mortgage debt. That prior to and at the time of his bankruptcy, the Plaintiff had established an extensive and lucrative business as a *West India* merchant, trading particularly to *Jamaica*, and had an extensive and valuable mercantile connection and correspondence in that island and in *London*; and thereby possessed the certain means of providing freight for a ship

The Court will entertain a suit for an account of the freight of a ship, grounded on a contract which also contains stipulations affecting to give an ultimate right of property in the ship, and which may not be capable of being recognised or enforced as a whole, for want of being registered; provided the title to the freight is distinct from and does not necessarily depend upon a title to the ship claimed under such contract.

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out and home, to and from *Jamaica*; and that subsequently to his bankruptcy he was, desirous to secure to himself the ownership of the said three fourth parts or shares of the ship *Wellesley*, subject to the aforesaid mortgage; and for that purpose, by means of the future earnings which he knew he could command, to pay off the mortgage debt in full. That previously to the purchase of the ship by the Defendants the Plaintiff accordingly offered and proposed to the Defendants, and the Defendants consented and agreed to the proposal, that they should purchase the Plaintiff's three fourth shares, and that the ship should be employed, under the Plaintiff's management, in trading to and from *Jamaica*, and that the Plaintiff should procure the homeward and outward cargoes for the vessel; and that the profits and earnings of such trading, to the extent of three fourths, should be applied, in the first place, in satisfaction of the mortgage debt and interest, together with the proportionate part of the expenses attending the purchase of the ship, and that the surplus of the three fourths of the profits should be paid to the Plaintiff for his own use; and that after the aforesaid debt and interest, and expenses, should be paid off and discharged, the Plaintiff should be entitled to the three fourth shares of the ship so to be purchased, for his own benefit, and that the same should be thereupon assigned to him by the Defendants accordingly. That the ship made several voyages under the Plaintiff's management, whereby considerable freight was earned and the mortgage debt very much reduced, and the Plaintiff afterwards agreed with the Defendants that the full amount proved by the Defendants under the *fiat*, being the whole debt owing by the Plaintiff to them on the mortgage, or otherwise, after giving credit for the produce of certain other securities held and realised by the Defendants, should be satisfied out of the future earnings of the ship, and

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of the cargoes so to be obtained by the Plaintiff. That the Plaintiff, in *August* 1834, being in want of money, applied to the Defendants and requested them to advance the sum of 500*l.* on the security of his promissory note, payable at four months after date, but to be renewed, from time to time, in case the Plaintiff should require it, so long as the *Wellesley* should be sailed in the employment of the Defendants, and continue to be loaded by the Plaintiff in manner aforesaid; and proposed that such loan should be repaid out of the earnings of the ship, and should be a debt thereon, in like manner as the original mortgage debt. That the terms of this proposal were contained in two letters, written and sent by the Plaintiff to the Defendants, and dated the 21st and 23d days of *August* respectively, and set out in the bill. That the Defendants agreed to the Plaintiff's proposal, and shortly afterwards made the advance accordingly, by crediting the Plaintiff in account with the sum of 500*l.*; and the Plaintiff thereupon gave the Defendants his promissory note for 500*l.*, payable at four months; and such note was given, and such loan received by the Plaintiff, upon the terms and conditions before mentioned, and on the faith and reliance that such note would be renewed when and as the Plaintiff might require, so long as he performed the agreement on his part. That after the purchase of the ship, as before mentioned, and as well before as after the additional loan of 500*l.*, the ship made several voyages to and from *Jamaica*, according to the arrangement; and the Plaintiff solely and exclusively procured full outward and homeward cargoes, whereby freight to the amount of several thousand pounds was earned by the ship. That the Plaintiff's services were worth at least 400*l.* or 500*l.* a year to the Defendants. That in *November* 1834 the *Wellesley* was reported unfit to proceed again upon her voyage, and was sold for

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1400*l.*, and that another ship, called the *Sarah Barry*, was thereupon purchased by the Defendants, at the price of 2450*l.*, and was substituted for the *Wellesley*, and employed in the same manner under the direction and superintendence of the Plaintiff. That the *Sarah Barry* was purchased upon the express agreement and understanding of the Plaintiff and Defendants, that the Plaintiff should have all the same rights and interests, in respect thereof, as he had theretofore had in the *Wellesley*, and that the loan of 500*l.* should be continued, and be in like manner renewable, on the *Sarah Barry*, as the same had been on the *Wellesley*; but that the Defendants should be entitled to debit, against the Plaintiff, three fourths of the equity of redemption of the new ship, and three fourths of her purchase-money and expenses. That the Plaintiff, by his exertions, procured freight for the *Sarah Barry* for several voyages outwards and homewards, which voyages ought to have been performed by that ship; but that the Defendants declined to employ her any longer in that trade, to the great loss and injury of the Plaintiff; and the Plaintiff submitted that, the Defendants being mortgagees in possession of the ship, they were chargeable with all the loss which had accrued or might accrue to the Plaintiff in consequence of that their default.

The bill then charged that an account had arisen and subsisted between the Plaintiff and the Defendants in respect of the matters aforesaid; and that the whole, or nearly the whole of the Defendants' demands on the Plaintiff had been paid or satisfied upon the result of the account. That the Defendants had delivered an account of the freight of the *Wellesley*, which account, however, was incomplete and erroneous; and that they had also brought an action in the Court of Common Pleas on the Plaintiff's note. That the Defendants had
 admitted

admitted in letters, that they had given the Plaintiff credit for the freight of the ship, but that they denied the agreement respecting the ship.

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The bill prayed an account of dealings respecting the ships and matters aforesaid, of the freight, earnings, and expenses of the two ships, of the proceeds of the sale of the *Wellesley*, of what was due from the Plaintiff to the Defendants, and payment by the Defendants of the balance due, and that the Plaintiff might redeem the *Sarah Barry*. It also prayed an injunction against the action on the note, and against employing or disposing of the *Sarah Barry* without the sanction of the Plaintiff.

To this bill the Defendants filed a general demurrer, which the Master of the Rolls allowed, and the Plaintiff thereupon appealed.

Sir *W. Horne* and Mr. *Rogers*, for the appeal.

The bill does not allege, what indeed could not have been alleged with truth, that the contract for the transfer of the property in these ships to the Plaintiff has been registered in the manner required by the Ship Registry Acts; and the judgment of Lord *Langdale* allowing the demurrer proceeded entirely upon that ground, his Lordship being of opinion, that the Court could not give effect to such a transaction without defeating the whole object and provisions of those statutes. It is, however, to be observed, that the recent Ship Registry Acts (*a*) do not, like the former acts (*b*), apply, and were never intended to apply to executory contracts. Upon a close comparison of the

6 G. 4.

(a) 5 & 4 W. 4. c. 55.; and (b) 26 G. 3. c. 60. 34 G. 3. c. 68.

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6 G. 4. c. 110. (of which the present act is, in this respect, merely a transcript) with the 34 G. 3. c. 68., a marked distinction between the language and provisions of the two enactments is apparent; and as the attention of the legislature had been pointedly called to the subject by the observations of Lord *Tenterden* in his *Treatise on Shipping*, published before the last act was passed (a), it is impossible to suppose that the distinction was not intentional. This transaction took place while the 6 G. 4. c. 110. was in force; and it is clear from the thirty-fourth, thirty-seventh, and forty-fifth sections of that act, and from the forms there set out, that the enactments were made with reference solely to the case of sales or mortgages, and are utterly inapplicable to a contract of this description, for which no provision as to registration is attempted to be made. It was therefore utterly impossible for the Plaintiff, when he entered into this transaction with *Whitmore and Co.*, to have taken any steps towards complying with the requisitions of the act, however much he might have wished to do so. In *James v. James* (b) it was decided that where an annuity was of such a kind that a memorial of it could not be enrolled, there being no form of memorial specified which was applicable to the particular case, it did not fall within the act at all.

Upon the same principle it has been decided that the Statute of Frauds (c), the seventeenth section of which expressly enacts, that no sale of goods to the amount of 10*l.* or upwards shall be valid without some memorandum in writing or a part delivery of the goods, does not extend to a case where the contract is executory, and where the goods contracted to be sold, not
 being

(a) *Abbott on Shipping*, 50.
 5th ed.

(b) 2 *Brod. & Bing.* 702.

(c) 29 *Car. 2. c. 3.*

being *in esse*, are incapable of actual delivery; *Groves v. Buck* (a). It is impossible to point out any mode in which this transaction could have been registered; the case, therefore, is one which is not struck at by the act of parliament. It would be extremely strong to hold, that a man should be absolutely precluded from entering into any valid agreement for the sale or transfer of a ship at a future period. At law it has been ruled, that a lien may be effectually given on a ship's papers; and on this very principle, that the contract is not of such a nature as to be capable of registration within the act of parliament; *Mestaer v. Atkins*. (b) In *Prouting v. Hammond* (c) it was held that where the Defendant appeared on the register as absolute owner of a ship, although under an agreement between him and the Plaintiff, he was only mortgagee, and the Defendant sold the ship and received the purchase-money, and said he would account for the balance of the proceeds, the Plaintiff was entitled to recover. If there were any doubt on the subject, the Ship Registry Acts ought to be construed strictly; for they are in a sense penal, and go to destroy titles. The observations of Lord *Ellenborough* in *Hicks v. Hicks* (d) with respect to an annuity deed, are very pertinent to this case. Either there was a valid contract for the sale of the ship, or there was not; if not, the Defendants have received the purchase-money without consideration, and the Plaintiff is entitled to an account.

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The contract, besides, has reference to two distinct subjects; the transfer of the interest in the ship, and the liquidation of the note out of the Plaintiff's earnings by means of the freight. Even if it were void as to the former, it would be good as to the latter; and the right to

(a) 3 M. & S. 178.
(b) 5 Taunt. 581.

(c) 8 Taunt. 688.
(d) 3 East, 12.

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to the account as to that part of the transaction would follow of course. It is settled that the future earnings of a ship may be validly assigned as a security for advances made, and to be made on the credit of such earnings, as distinct from the ship itself; and that a court of equity will assist the assignee in establishing a right founded on such assignment; the interest which he thereby acquires in the earnings not being within the purview of the registry acts; *In re the Ship Warre*. (a) The Court will sever the two parts of the transaction, according to the doctrine of Lord Eldon and Sir W. Grant in *Mestaer v. Gillespie* (b), and passing by that part which is invalid, will give effect to that part which is legal. Any other course would deprive the Plaintiff of all remedy, and, in effect, sanction the grossest injustice. The prayer of the bill may be too extensive; but, upon a general demurrer, that is immaterial, if the Court sees that a case is stated upon the bill which entitles the Plaintiff to some equitable relief; *Deare v. Attorney-General*. (c)

Mr. Wigram and Mr. Richards, in support of the demurrer.

The bill states a case which might give a good equity if the subject-matter were any thing but a ship; but it does not state, and the fact is otherwise, that any registration of the contract has been made pursuant to the provisions of the Ship Registry Act. Now it has been settled, so far back as the time of Lord Thurlow, in *Hibbert v. Rolleston* (d), and the doctrine has been approved and followed both by Sir W. Grant and Lord Eldon

(a) 8 Price, 269. n.; and see 11 Ves. 629. 636.; *Douglas v. Russell*, 4 Sim. 524.; 1 *Mylne & Keen*, 488.

(b) 11 Ves. 629. 636.

(c) 1 Yo. & Coll. 197.

(d) 3 Bro. C. C. 571.

Eldon in *Mestaer v. Gillespie*, that any defect in the registration of the instrument, conformably to the regulations of the Ship Registry Act, renders the contract absolutely void both at law and in equity;—differing in this respect, as Lord *Eldon* observed, from the Statute of Frauds and the Annuity Act, which were intended only for the protection of individuals, and were not, like the Ship Registry Acts, founded on considerations of public policy. Decisions upon those acts, therefore, have no application. The principles laid down in *Hibbert v. Rolleston* and *Mestaer v. Gillespie* have been acted upon in a great number of other cases; *Curtis v. Petry* (a), *Speldt v. Lechmere* (b), *Ex parte Yallop*. (c) In *Thompson v. Leake* (d) Sir *Thomas Plumer*, following the case of *Barker v. Chapman* (e), went still further, and decided, that if on the sale of a ship the provisions of the Ship Registry Act were not strictly complied with, no relief could be given in equity, even on the ground of accident or fraud. In *Battersby v. Smyth* (g), where *A.*, *B.*, and *C.* had agreed to purchase a ship, and that it should be registered in the name of *A.* and *B.* only, but that the profits of the ship should be divided among the three, Sir *John Leach*, on the ground of public policy, held the agreement to be illegal, as a fraud upon the Ship Registry Act; and he allowed a general demurrer to a bill filed by *C.* against *A.* and *B.* for an account of the profits. That decision is a clear and direct authority for Lord *Langdale's* order allowing this demurrer. The uniform current of authorities fully establishes the proposition, that wherever more persons than one have paid for a ship, but the name of one only has been entered on the register as the owner, the Court can give

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(a) 5 Ves. 739.

(b) 15 Ves. 588.

(c) 15 Ves. 60.

(d) 1 Mad. 39.

(e) Stated in 1 Mad. 44, and 400. n.

(g) 5 Mad. 110.

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give no assistance to the others against such registered owner. In *Mestaer v. Gillespie* there was an agreement to assign a proportionate share of a ship, and also of the freight to be earned by that ship; and Lord *Eldon* appears to have intimated an opinion, that the transaction, though void as to the ship, might possibly be upheld as to the freight; but that was not the principal point in the cause. The case itself was eventually compromised; and the question has since been solemnly determined otherwise by Sir *John Leach* in *Battersby v. Smyth*.

All these cases, it is true, were decided under the old Ship Registry Acts, the 26 G. 3. c. 60., and 34 G. 3. c. 68.; but the alleged differences between them and the 6 G. 4. c. 110. and 3 & 4 W. 4. c. 55. are only verbal. The requisitions, with respect to registration, are in all of them substantially the same; although in point of fact they are more stringent and extensive in the existing than in the former statutes. The distinction now taken between executory and *de presenti* contracts, has never been suggested, much less countenanced, in any reported case; and if it were allowed to prevail, it would go far to defeat the whole scope and spirit of the statute. The words "or other instrument" introduced into the thirty-seventh section of the 6 G. 4. c. 110., are more general than "transfer, contract, or agreement," the words used in the corresponding section of the 34 G. 3., and are large enough to include every conceivable species of contract relating to property in ships. All doubt, however, is set at rest by the clear and express language of the second section of the 6 G. 4. c. 110., which enacts — and the enactment is copied *totidem verbis* into the present act — "that no ship or vessel shall be entitled to any of the privileges or advantages of a *British* registered ship, until the person or persons claiming property therein shall

shall have caused the same to be registered in manner thereafter mentioned." From the statement in the bill, besides, it would appear that the transaction between these parties amounted to or constituted a mortgage; and, accordingly, it is part of the prayer that the Plaintiff may be permitted to redeem the *Sarah Barry*. Now the case of a mortgage of a ship is provided for in terms by both of the recent acts; so that the question as to the necessity of registering executory contracts does not arise.

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It is said that this agreement, though not registered, is good so far as it applies to the earnings of the *Wellesley* and *Sarah Barry*, and that an assignment of the future profits of a ship is valid. No doubt, if the freight of a ship is made the subject of a specific and separate assignment, effect would be given to such an instrument in equity; but the question here is, whether in the case of an agreement like the present, in which the title to the ship and the title to the freight are inseparably mixed up and blended together, the Court, consistently either with principle or with justice, can undertake to execute it partially, or to direct any account to be taken upon it. The whole must be considered as forming one entire transaction, the several parts of which are mutually dependent upon each other; and one, and that the main part of it, being, *ex concessis*, void, how can the Court uphold and give effect to the rest, without doing violence to the spirit and intent of the agreement? In *Battersby v. Smyth*, where the bill sought an account as to an interest, not in the ship, but merely in the profits, Sir John Leach refused to grant any relief; and the objections which his Honor considered valid in that case, apply with infinitely greater force here; for the account which the Plaintiff prays, extends equally to the ship and to the freight, and cannot be fairly or satisfactorily taken, unless it comprehends both.

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both. How, indeed, is it possible, without working great practical injustice, to adjust the account of the freight and earnings of the two vessels, as between these parties, without giving the Defendants credit in account for the value of the vessels which were their property, and when it was one essential article of the agreement that the Plaintiff should work out the purchase-money by means of those very earnings? Suppose, what is the fact here, that the Defendants have actually paid the whole price of the ship, are they now to account for three fourths of the profits to the Plaintiff, without receiving or being credited in account with the amount of their purchase-money? The right to the account grows out of, and is ancillary to the transaction for the transfer of the property in the ship; and any account which shall not include the value of that property, must of necessity be unilateral and unfair. If the Court is to interfere at all, it has but two courses open: it may either affirm the contract *in toto*, not excepting that part which applies to the purchase of the ships, and by so doing, set all the authorities, as well as the express language of the Ship Registry Act, at defiance; or it may strike out so much of the contract as refers to the purchase, and give effect to the remainder; thereby virtually defeating the main object of the parties, and enforcing a collateral and subsidiary arrangement, in which, standing by itself, there is no mutuality. Both these courses, it is obvious, are equally objectionable; and the Court therefore will leave the parties to their legal remedies.

Sir W. Horne, in reply.

The LORD CHANCELLOR [after stating the substance of the bill]: —

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I will assume that the existing Ship Registry Act is as strict in its provisions as the former act, and that the law prohibits the Court from giving any effect to the contract stated in the bill, so as to affect either of the ships, and that both the ships, therefore, must be considered as the property of the Defendants. What then upon that supposition is the arrangement? That the Plaintiff shall have the management of the Defendants' ships, and shall procure cargoes for them; that the freight, when received, shall be applied in payment of certain sums due from the Plaintiff to the Defendants, and that the surplus shall belong to the Plaintiff; and that the Defendants shall not sue upon the Plaintiff's note, but take payment out of the freight so to be procured. The statement of the bill is, that both parties acted upon this agreement; that the freight received has actually paid off all sums due to the Defendants from the Plaintiff, including the promissory note for 500*l.*; and that the Defendants have rendered accounts of the freight, but have, notwithstanding, brought an action upon the note.

If the effect of the Ship Registry Act be such as the Defendants insist it is, the Plaintiff may not be able to assert his title to the ship; but so far as the transactions are completed, if the Defendants have credited the Plaintiff with the freight as agreed, and so discharged his debt to them, the Plaintiff must be entitled to have that account taken. He alleges, that upon the faith of that agreement, he has devoted five years to the service of these ships; that his remuneration was to be the payment of his debt to the Defendants out of the freight, and the ultimate property in the ship. He may lose the latter, but why is he to be deprived of the benefit of the former? What right have the Defendants to withdraw from the account that freight which they agreed to place
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to the Plaintiff's credit, and thereby leave him exposed to liability upon his note, which note he alleges has been actually paid off by the result of the account kept and taken according to the contract.

It was said that if that be the case, the debt is paid at law, so that the Plaintiff would have a good defence to the action. That is true; but if it be necessary to come here to have the account taken, in order to shew that the debt is paid, a demurrer cannot be supported.

It was argued that the whole was one transaction, and that if invalid as to the ship, under the Registry Act, it could not be good as to the freight. But in *Mestaer v. Gillespie* (a) the ship and freight were comprised in one bill of sale, invalid as to the ship; nevertheless, Lord *Eldon* and Sir *W. Grant* both thought the contract might be good as to the freight.

The Defendants then say, that if the ship be theirs by law, the freight must also be theirs. This, however, by no means follows: the title to the freight and the title to the ship are often separate; and although the act of parliament may prevent the Court from considering any one but the registered owner as the owner of the ship, that will not prevent the parties interested from dealing as between themselves upon another footing. If a ship be registered in the name of one, and he, admitting the ship to be the property of himself and another, places the freight to the joint account, and settles the account upon that footing, can he at a future time withdraw all such items from the joint account, because at law he alone can be recognised as owner of the ship?

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(a) 11 Ves. 621.

In *Proving v. Hammond* (a), the Defendant had been registered as the actual owner of the ship. The Plaintiff alleged that he was entitled to the equity of redemption, and that the Defendant was only mortgagee. The Defendant sold the ship, and told the Plaintiff he would pay him the balance. In an action for the balance, it was objected that the Defendant must be taken to be the absolute owner, and that there was therefore no consideration for the promise; but it was held that the Plaintiff should recover. In *Battersby v. Smyth* (b) a demurrer was allowed to a bill filed by a party claiming as part owner of a ship, but whose name did not appear upon the register, and praying an account of the profits; but in that case there was no allegation of any contract as to the freight, or that the amount of it had been placed to the Plaintiff's account by the Defendant. The title to the account of the freight was made to depend upon, and to grow out of the Plaintiff's alleged title of part-owner.

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I am therefore of opinion, that independently of any question upon the present Ship Registry Act, this bill contains allegations which, if proved, would entitle the Plaintiff to some part at least of the relief which he prays, and that the general demurrer, therefore, cannot be supported.

The order at the Rolls must be reversed.

(a) 8 Taunt. 688.

(b) 3 Mad. 110.

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Marriage articles recited that *L.*, the father of the intended husband, had agreed, in case the marriage should take effect, to pay 200*l.*, and also to settle the lands of *T.* in the manner, to the uses, and upon the trusts therein-after mentioned; and that *S.*, the father of the intended wife, who was an infant, had agreed to convey the lands of *G.* in the manner, at the time, to the uses, and upon the trusts therein-after mentioned, and also to pay to

PREVIOUSLY to and in contemplation of the marriage of *Evan Lloyd* the younger and *Esther Stephens*, articles of agreement, dated the 22d of October 1777, were made between *Evan Lloyd* the elder, the father of *Evan Lloyd* the younger, of the first part, *Evan Lloyd* the younger of the second part, *James Stephens* and *Mary* his wife of the third part, and *George Harris* and *Sylvanus Lloyd*, trustees, of the fourth part, whereby, after reciting the intended marriage between *Evan Lloyd* the younger and *Esther Stephens*, the daughter of the said *James Stephens*, and then an infant under the age of twenty-one years, and further reciting that, for the securing a competent maintenance for *Esther Stephens*, in case the marriage should take effect and she should happen to survive *Evan Lloyd* the elder and *Evan Lloyd* the younger, her intended husband, and for the better preferment in the world of *Evan Lloyd* the younger, *Evan Lloyd* the elder had agreed, in case the marriage should take effect, to pay the sum of 200*l.*, and also to convey and settle the several messuages, tenements, and lands thereafter

the intended husband 100*l.* upon the marriage: it was then covenanted by *L.* that, in case the marriage should take effect, and *S.* should, as soon as the intended wife came of age, settle the lands of *G.* to the uses thereafter expressed, he, *L.*, would settle the lands of *T.* to his own use until the marriage, and from and after the marriage, to his own use for life, with remainder upon certain trusts for the benefit of the husband and wife, and the issue of the marriage; and it was covenanted by *S.*, that in case the marriage should take effect, and *L.* should perform his covenant, he, *S.*, would settle the lands of *G.* to the use of himself for life, with remainder upon certain trusts for the benefit of the husband and wife, and issue of the marriage. The marriage took effect, and the wife came of age, but *S.* failed to settle the lands of *G.*: Held, nevertheless, that *L.* was bound to perform the covenant on his part.

thereinafter described, in the manner, to the uses, and upon the trusts thereinafter mentioned; and that *James Stephens* and *Mary* his wife, in consideration of the intended marriage, and for the better provision in the world of *Esther Stephens*, their daughter, had agreed to convey the moiety of the messuage, tenements, and lands thereinafter described, in the manner, at the time, to the uses, and upon the trusts thereinafter mentioned, and also to advance and pay the sum of 100*l.* to *Evan Lloyd* the younger upon the solemnization of the marriage; it was witnessed, covenanted, concluded and agreed upon, by and between the parties thereto, and *Evan Lloyd* the elder, for himself, his heirs, executors, administrators, and assigns, covenanted with *Evan Lloyd* the younger, his heirs and assigns, on behalf of himself and of *Esther* his intended wife, and the issue of the marriage, that in case the marriage should take effect, and *James Stephens* and *Mary* his wife, or the survivor of them, should, as soon as *Esther Stephens* attained her age of twenty-one years, at the costs and charges, and upon the reasonable request of *Evan Lloyd* the younger, or *Esther* his intended wife, convey and assure the moiety of the messuages, tenements, and lands thereinafter mentioned and described, to the uses thereinafter expressed of and concerning the same, then he, *Evan Lloyd* the elder, his heirs and assigns, would, at the costs and charges, and upon the reasonable request of *Evan Lloyd* the younger, or *Esther* his intended wife, or their heirs, convey and assure unto the trustees, *George Harris* and *Sylvanus Lloyd*, and their heirs, all those messuages, tenements, and lands, called *Tyn-y-Pwll*, therein particularly described, to hold the same to the use of *Evan Lloyd* the elder, his heirs and assigns, until the marriage; and after the solemnization thereof, to the use of *Evan Lloyd* the elder and his assigns, during his life, without impeachment of waste, with re-

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mainder to the use of the trustees and their heirs during the life of *Evan Lloyd* the elder, in trust to preserve contingent remainders; and after the decease of *Evan Lloyd* the elder, then to the use of *Evan Lloyd* the younger, and his assigns, during his life, without impeachment of waste; with remainder to the use of *Esther Stephens*, his intended wife, during her life, if she should so long continue unmarried, without impeachment of waste, in satisfaction of dower; with remainder to the first and every other son of the marriage, successively, in tail; with remainder to the daughters of the marriage as tenants in common in tail; with remainder to the right heirs of *Evan Lloyd* the elder in fee. And it was further witnessed, that in consideration of the intended marriage, and also of the covenant thereinbefore made on the part of *Evan Lloyd* the elder, and in pursuance of the aforesaid agreement on the part of *James Stephens* and *Mary* his wife, it was thereby covenanted, concluded, and agreed upon, by and between the parties thereto, and *James Stephens* for himself and *Mary* his wife, their heirs, executors, and administrators, covenanted with *Evan Lloyd* the younger, his heirs and assigns, on behalf of himself and the issue of the intended marriage, that in case the marriage should take effect, and *Evan Lloyd* the elder, his heirs or assigns, should in all things perform, fulfil, and keep the covenants thereinbefore contained on his, her, and their parts, then they, *James Stephens* and *Mary* his wife, and *Esther Stephens* their daughter, or the survivors or survivor of them, and all other necessary and proper parties, would, at the costs and charges, and upon the reasonable request of *Evan Lloyd* the younger, and the issue of the marriage, convey, settle, and assure one undivided moiety of and in the messuage, tenement, and lands called *Glandead*, therein particularly described; to hold to the said trustees and their heirs, to the use of

of *James Stephens* and *Mary* his wife, during their lives and the life of the survivor of them; with remainder to the use of *Evan Lloyd* the younger and *Esther Stephens* his intended wife, during their lives and the life of the survivor of them, if *Evan Lloyd* the younger should continue unmarried after the decease of his intended wife; with remainder to the use of the first and other sons of the marriage successively in tail male; with remainder to the use of the daughters of the marriage as tenants in common in tail; with remainder to the use of the right heirs of *Esther Stephens* for ever.

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The articles also contained covenants by *Evan Lloyd* the elder and by *James Stephens*, for himself and *Mary* his wife, for quiet enjoyment of the several premises, according to the uses thereinbefore limited and declared, and a covenant by *Evan Lloyd* the elder for the payment of the sum of 200*l.* to *Evan Lloyd* the younger, upon the solemnization of the marriage.

The marriage shortly afterwards took effect. *Evan Lloyd* the elder survived several years, and died in the year 1784, without having executed any conveyance of the lands called *Tyn-y-Pwllly*, pursuant to his covenant contained in the articles; and under his will, dated the 28th of *February* 1784, the legal estate in those lands became eventually vested in his son *Evan Lloyd* the younger, in fee simple.

In the year 1813, *Evan Lloyd* the younger died intestate, leaving his widow *Esther* and five children, issue of the marriage, surviving him; and the lands of *Tyn-y-Pwllly* thereupon descended to his eldest son and heir-at-law, *John William Lloyd*, who in the year 1825 died without issue, having devised all his estates to his wife *Rebecca Lloyd* in fee. *Esther Lloyd* died in

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the year 1829, and the Plaintiff, *David Lloyd*, who was the second son of *Evan Lloyd* the younger and *Esther* his wife, then filed the present bill, claiming under the marriage articles of his father and mother to have been equitable tenant in tail of the lands of *Tyn-y-Polly*; and alleging that he had barred the estate tail by an equitable recovery; and praying that the legal estate in the lands might be decreed to be conveyed to himself in fee.

It appeared from the answer of *Rebecca Lloyd*, and was admitted as a fact in the cause, that the lands of *Glandead*, the moiety of which was, according to the marriage articles, to be included in the proposed settlement, were, at the date of the articles, subject to a mortgage in fee, made in the year 1771, and of which the equity of redemption was settled on *James Stephens* and *Mary* his wife, for their lives, with remainder to their daughter *Esther* in tail; and that, in the year 1783, the mortgage was, under a decree of the Court of Exchequer, absolutely foreclosed by the mortgagee, so that the covenant of *James Stephens* for the settlement of that property was incapable of being executed. It was further admitted that *Esther Lloyd*, the daughter of *James Stephens* and *Mary* his wife, attained the age of twenty-one in the month of *March* 1778; that *James Stephens* survived *Evan Lloyd* the elder, and died in the year 1794, without having done any act on his part towards performing his covenant to settle the lands of *Glandead*; and that in point of fact the lands of *Glandead* had never been settled accordingly.

The Vice-Chancellor having decided that the Plaintiff was entitled to the conveyance which he prayed by his bill, the Defendant *Rebecca Lloyd* appealed from his Honor's decree.

Mr.

Mr. Wigram, Mr. Wilbraham, and Mr. Girdlestone, in support of the decree.

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The instrument upon which the question arises is very loosely and inartificially drawn; and some of its provisions are neither consistent nor intelligible. It is not, therefore, to be construed with the same strictness as if, instead of being mere articles, it were a formal settlement; but the Court will endeavour to get at the true intent of the parties, upon a careful consideration and comparison of every part of the contract, and if it can discover, will give effect to that intent, even in opposition to the literal meaning of the words. In this view it is material to observe, that although the covenants by the respective fathers to settle the lands are in form conditional, the language of the recitals and of the covenants for title is not conditional but absolute. There is no occasion, however, to rely upon the distinction between the rules of construction as applicable to articles and to deeds; for on the face of these articles themselves, as they would be construed in a court of law, the Plaintiff is clearly entitled to a decree. In Serjeant *Williams's* note to *Pordage v. Cole (a)*, most of the cases at law on the subject of mutual and dependent covenants are collected, and several rules are laid down for the purpose of ascertaining when covenants are to be considered as coming within that description. One of the first rules is stated in these words;—"It is justly observed, that covenants, &c. are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties and the good sense of the case; and technical words should give way to such intention." Another rule laid down by the same writer is, that "where a covenant goes only to part of the consideration on both sides, and a breach of such covenant

(a) 1 Saund. 319.

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covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the Defendant, without averring performance in the declaration." On that principle was decided the case of *Boone v. Eyre*(a), which is exactly applicable to the present case. There the principal consideration, the conveyance of the estate, having been given, the Court would not hold want of title to a few negroes to be such a breach as would excuse the purchaser from the performance of his covenant. So here, the principal consideration, the marriage, having passed, the Court will not hold *Lloyd* the elder to be discharged from his covenant, because the wife's father has not fulfilled his part of the engagement. In like manner there are cases at law where parties have contracted mutual obligations, and have agreed that, on breach by either, the party failing shall pay a certain sum. The Courts have treated that as an agreement not to be performed literally; but considering the sum to be in the nature of a penalty, and not of liquidated damages, have only allowed such damages as had been actually sustained, and not the whole amount stipulated; *Astley v. Weldon*(b), *Kemble v. Farren*.(c)

With respect to the performance of these covenants, if taken literally, how were they to be performed? Neither act is to precede the other. How are *Lloyd* the father and *Stephens*, who have no personal interest themselves in the performance, to be brought together, if neither is to be bound until the other has performed his part of the obligation? There is another class of cases in equity which is very strong to shew, that where the husband's father agrees to make a settlement in consideration

(a) 1 *H. Bl.* 275. note a.(c) 6 *Bing.* 141.(b) 2 *Boa. & P.* 346.

sideration of the wife's portion, the failure of her portion shall not excuse him from performance of his agreement; *North v. Ansell* (a), *Perkins v. Thornton* (b), *Harvey v. Ashley* (c), *Crofton v. Ormsby*. (d) This is a consequence which necessarily flows from the peculiar nature and object of every marriage settlement. The husband and wife are there considered in the light of purchasers on behalf of their unborn issue (e), who, in this way, become *quasi* contracting parties; and if, therefore, the relations on either side, who are parties to the contract, fail in performing their part of it, the children when they come into *esse* may call for a specific performance to the extent of their interest in the subject-matter. In the present case *Stephens* was to convey *Glandead*, at the request of *Lloyd* the son or *Esther* his wife. *Glandead* was foreclosed by a mortgagee six years after the marriage; but up to that time *Lloyd* the son might have taken steps to compel *Stephens* to settle *Glandead*; and as he did not do so, but afterwards took *Tyn-y-Pwllly* by devise from his father, he and those claiming under him cannot take advantage of his laches and resist the performance of the father's covenant.

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Mr. Jacob and Mr. Puller, for the Defendant.

The question is, whether it was competent to the parties to make the settlement of *Tyn-y-Pwllly*, by *Lloyd* the father, conditional and dependent on the performance by *Stephens* of his covenant to settle *Glandead*. If it was, and if such a stipulation was lawful, of which there cannot be a doubt, in what conceivable mode could they have taken more effectual steps for that purpose?

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| (a) 2 P. Wms. 618. | <i>Hancock v. Hancock</i> , <i>ibid.</i> 605.; |
| (b) <i>Amb.</i> 502. | <i>Whitmel v. Farrel</i> , 1 Ves. sen. |
| (c) 3 Atk. 607. | 256.; and see <i>ibid.</i> 377.; 2 Ves. |
| (d) 2 Sch. & Lef. 583.; <i>Baskerville v. Baskerville</i> , 2 Vern. 448.; | sen. 309. |
| | (e) 11 Ves. 235. |

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The language of the contract amounts to an express declaration, that *Lloyd's* meaning was that his covenant should be contingent on the performance of the other. The state of the title to *Glandead* sufficiently explains why that was his object. At the time when these articles were prepared, *Glandead* was mortgaged for nearly its whole value; and the equity of redemption was settled upon *Stephens* and his wife for life, with remainder to *Esther Stephens* the intended wife in tail. The latter had not then attained twenty-one; and until she came of age, no settlement of *Glandead* could be effectually made. She might die under age, or her father might not be able to redeem *Glandead*. It was very natural, therefore, for Mr. *Lloyd* the father to say to Mr. *Stephens*, "I cannot depend on your promise to settle *Glandead*. I am willing to contribute my share towards making a provision for the wife and children; but as there is a doubt whether you can make good yours, I will only agree to settle *Tyn-y-Polly* in case you settle *Glandead*." The words used are clearly words of condition; and the meaning of the parties manifestly was, that the settlement should be conditional. Whatever slight inaccuracies and discrepancies may be found in the articles, which doubtless are artificially penned, the Court has no jurisdiction to strike the condition out of the contract, and make a new settlement for the parties, different from what they themselves contemplated. These inaccuracies and discrepancies do not, in the least, affect or break in upon the plain intention to make the contract conditional. The recital, it is true, does not state any such intention; but the recital is very general in its terms, and refers to the operative part for the real meaning of the parties. This case much more nearly resembles *Porter v. Shepherd* (a) than

(a) 6 T. R. 665.

than *Boone v. Eyre* and the rest of the cases cited on the other side; none of which, indeed, have any application, for in none of them was any express condition introduced. Those cases only shew that where no express condition is found inserted, the Court looks to the justice of the case, and raises an implied condition or not, according to the circumstances. But that is a very different thing from striking an express condition out of a deed. That would not be to construe, but to correct the instrument; a course for which there is no authority in a case like the present, and which the Court, besides, upon this bill, is not called upon or able to take; *Sumner v. Powell*. (a) Suppose *Lloyd*, the father, instead of taking a covenant from *Stephens* to settle *Glandead*, had required the insertion of some such condition as those mentioned by *Blackstone*—as for example, “if *Stephens* should go to or return from *Rome*,”—what equity would there be to strike that condition out of the agreement? Yet that is in effect what is sought to be done here, and what the Vice-Chancellor’s decree has authorized.

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Mr. *Wigram*, in reply.

The LORD CHANCELLOR [after stating the substance of the marriage articles, and the material facts of the case]:—

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The Defendant insists that by the failure of *Stephens* to perform his part of the marriage contract, *Evan Lloyd* the elder became released from all liability to perform his part, on the ground that, by the terms of *Lloyd’s* covenant, performance by *Stephens* was a condition precedent to performance by *Lloyd*; and the question

(a) 2 Mer. 30.

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question is, whether there is not enough to shew that such a construction would defeat the intention, and that the intention was that each of the contracting parties should be liable for the performance of his own covenant, whether the other party could or could not, or did or did not perform his.

If the provisions are clearly expressed, and there is nothing to enable the Court to put upon them a construction different from that which the words import, no doubt the words must prevail; but if the provisions and expressions be contradictory, and if there be grounds, appearing upon the face of the instrument, affording proof of the real intention of the parties, then that intention will prevail against the obvious and ordinary meaning of the words. If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention.

The present is not a case in which the Court can refuse to interfere on account of the obscurity of the contract. The marriage has taken place; the contract has been so far performed that the Court must put some construction upon it, to the extent to which it remains to be performed; and the question is what that construction ought to be.

The whole question turns and was argued upon the construction of these articles; and in this view it is most important correctly to ascertain what the parties themselves have expressed in the recitals, as their understanding of the contract. According to those recitals *Lloyd's* agreement is, in case the marriage shall take effect, to pay 200*l.*, and to convey and settle: no time is limited for conveying and settling other than the time
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of payment of the 200*l.*, and the only event specified is the intended marriage. It is evident, therefore, that upon the marriage taking effect, *Lloyd* would have been bound to pay the 200*l.*, and to convey and settle the estate. But, in that part of the recital which refers to the contract by *Stephens*, there is a marked distinction between the period at which he was to pay his 100*l.* and the period at which he was to convey the estate. His agreement, according to the recital, was to convey the estate at the time thereafter mentioned, that is to say, when his daughter, having attained twenty-one, would be competent to bar her estate tail in that portion of the property which her father was to settle.

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[His Lordship then read the covenants.]

Upon the covenant of *Lloyd* it may be observed that, according to the terms of it, his estate was to be settled to his own use until the marriage, and, from and after the marriage, to other uses. Here then is a covenant which, if the Defendant's argument be correct, was not to operate until some considerable period after the marriage, that is to say, until *Stephens* made the settlement on his part upon his daughter *Esther's* coming of age; and yet it could only have been duly executed by a conveyance made at the time of the marriage, inasmuch as it refers to the creation of uses which were to arise anterior to, or at any rate contemporaneously with that event. The two provisions in the covenant, it is obvious, are utterly inconsistent and irreconcilable.

It was hardly attempted to be disputed (and all the authorities in effect prove) that, with respect to marriage contracts, there can be no resistance on the part of one, because another contracting party has failed to perform his part of the agreement; and the obvious
reason

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reason is that the parties to the contract are not the only persons having an interest in the subject, but the contract is made by them on behalf of the issue of the marriage. Although, therefore, in the case of an ordinary contract, a party who has not performed his part may not be entitled to claim the benefit of it against the other party, it is different in marriage articles, where the two contracting parties reciprocally enter into contracts both of which are made for the benefit of a third party. Unquestionably, however, even in the case of a marriage settlement, the covenants may be so framed as to be mutually dependent; and if it be clear on the face of the settlement that such was the intention, that intention must prevail.

In the present case it was contended on the part of the Defendant that the Court has no right to go out of the terms of the contract, and to construe the covenant by *Lloyd* otherwise than according to the literal import of the words. On the other side reference was made to the case of *Pordage v. Cole* (a), in a note to which Serjt. *Williams* has collected a variety of other cases in which the Court has done great violence to the strict letter of covenants for the purpose of carrying into effect what was considered to be the real intention of the parties. One of these cases was *Boone v. Eyre* (b), where the covenant was that, *A.* well and truly performing all and every thing therein contained on his part to be performed, *B.* would pay an annuity, and where it was held that the annuity was payable by *B.*, although *A.* had not performed all and every thing on his part to be performed. *Kentish v. Newman* (c) is a very strong authority proceeding upon the same principle.

On

(a) 1 *Saund.* 319.

(c) 1 *P. Wms.* 234.

(b) 1 *H. Black.* 273. n. a.

On the part of the Defendant the case of *Sumner v. Powell* (a) was cited to impeach this doctrine. The question there was, whether a covenant joint in its form should be construed as joint and several. That case, however, only decided that the terms of the instrument must prevail where there is nothing to lead to a construction different from the ordinary meaning of the words; and the judgment of Sir *W. Grant* assumes that where there are legitimate materials leading to a construction different from the ordinary meaning of the words used, the Court may construe the words accordingly; as in the instance of a joint bond given for a prior liability which was joint and several. It is to be observed, moreover, that where the evidence to put such a construction upon the words is to be found in the instrument itself, it is much more safe and satisfactory than where—as in the case of joint bonds construed to be joint and several—the evidence is sought for in the circumstances and situation of the parties.

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In this case, then, we have the agreement recited: the consideration is marriage; the object is to provide for the wife, and to advance the husband, who is the son of the covenantor. One event only is mentioned as that upon which the liability is to arise, namely, the marriage. Upon that event taking effect, *Lloyd* the elder is to pay 200*l.*, and to settle and convey his estate “in the manner, to the uses, and upon the trusts after mentioned,” not upon any conditions or contingencies after mentioned. With respect to *Lloyd's* covenant, there is no distinction, as to him, between his contract to pay the 200*l.*, and to convey the estate of *Tyn-y-Pwll*; whereas, with respect to *Stephens's* covenant, he is to pay 100*l.* upon the marriage, and to settle the half of the estate

(a) 2 *Mer.* 30.

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estate of *Glandead* "at the time after mentioned," which is upon his daughter attaining twenty-one.

So far then the contracts by *Lloyd* and by *Stephens* are perfectly distinct and independent. *Lloyd* is to convey his estate upon the marriage; *Stephens*, not until afterwards, when his daughter attains twenty-one; and accordingly *Lloyd's* estate is to be settled to uses which are to commence even before, but certainly "from and after the marriage," while, with respect to that of *Stephens*, there is no such provision. All this leaves no doubt of the intention of the parties. But then the covenants, by *Lloyd* and by *Stephens*, are each in terms made to depend upon the performance of the covenant by the other. *Lloyd's* obligation, which is to be performed upon the marriage, is made to operate only in case *Stephens* shall perform his, which was not capable of being performed till some time after the marriage; and in the same manner *Stephens's* covenant is made to depend upon the performance of *Lloyd's*; so that *Lloyd's* act is to precede *Stephens's*, and *Stephens's* to precede *Lloyd's*.

It was argued, indeed, that both were to be simultaneous; but this would be doing as much violence to the words as is required in order to make them consistent with the intention of the parties as declared in the recital. These provisions cannot be carried into effect according to the letter of the terms used; but the intention of the parties is sufficiently expressed. The words used must therefore yield to the declared intention.

I am of opinion that *Lloyd's* liability to settle his estate was not removed by the failure of *Stephens's* covenant to settle his, and that the decree of the Vice-Chancellor is therefore correct.

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SOUTHBY v. HUTT.

Feb. 2, 5. 15.

THIS was a suit instituted by the vendor of an estate which, in the month of *May* 1833, was sold by auction in a great number of lots, for the purpose of enforcing a specific performance of his contract against the purchaser of certain of the lots.

The main question in the cause was whether, upon the true construction of the conditions of sale, the Plaintiff was or was not relieved from the obligation of verifying the abstract of his title by producing, for the inspection of the Defendant or his solicitor, the several documents mentioned in the abstract, or by other satisfactory evidence. A subordinate question was, whether, if that point should be decided against the Plaintiff, the Defendant had not, by his subsequent conduct, and upon the result of the dealings and correspondence which had taken place between the respective solicitors of the parties, waived all objection to the title.

The conditions of sale, so far as they were material to the question between the parties, were the following:—

“4th. The vendor will, at his own expense, deliver an abstract of the title, to the purchaser, or his solicitor, of

By conditions of sale it was stipulated that the vendor of an estate which was sold in lots should deliver an abstract of the title to the purchasers, and deduce a good title; but that as to a part of the estate, acquired under an inclosure, he should not be bound to shew any title thereto prior to the award; and it was further stipulated that the vendor should deliver up to the largest purchaser in value all the title deeds and other documents in his custody, but should not be required to produce any

original deed or other documents than those in his possession and set forth in the abstract: Held, on the construction of these conditions, that they did not relieve the vendor from his liability to verify the title shewn upon the abstract by producing the title deeds themselves, or, if any of them were not in his possession, by other satisfactory evidence.

If a vendor intends to deprive a purchaser of the right to the production of any evidence necessary to verify the title beyond what the title deeds in his own custody will supply, he is bound to make that intention previously known to the purchaser in clear and explicit terms.

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the first seven lots, and lot 33., within twenty-one days from the day of the sale, and deduce a good title; but as to such parts of the land as were allotted or taken in exchange under the award of the commissioners of the *Appleton* inclosure, the purchaser shall not be at liberty to require, and the vendor shall not be bound to shew, any title thereto prior to the said award, from which period the title to such lands will be deduced. The purchaser shall, within the next twenty-one days after the delivery of the abstract, declare in writing, his acceptance or disapproval of the title, after which he is to be precluded from raising objections: and in case objections are made within that period, the vendor shall be at liberty to vacate the sale, upon returning the deposit with interest, auction duty, or other further compensation.

“ 5th. That upon payment of the remainder of the purchase-money, on or before the time above mentioned, the vendor will convey the premises to the respective purchasers, who are to be at the expense of preparing their own conveyances.

“ 6th. The vendor will deliver up, to the purchaser of the greater part in value of the said estates, all the title deeds and copies of deeds, and other documents in his custody, but shall not be bound, or required, to produce any original deed, or other documents than those in his possession and set forth in the abstract, or which relate to other property; and such purchaser is to enter into the usual covenants for the production of the title deeds to the purchaser or purchasers or proprietor of the remaining or other lots; but if the largest portion in value of the estate shall remain unsold, the vendor shall be entitled to retain the deeds, upon entering into such covenants; all such covenants

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to be prepared by and at the expense of the person or persons requiring the same, who may have attested copies of such deeds at his or their own expense."

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The decree of Lord *Langdale*, made upon the hearing of the cause at the Rolls, declared that the Defendant was not entitled to have the abstract of the title verified, except so far as the Plaintiff could verify the same by the production of the deeds and other documents in his possession; and that subject to the Plaintiff's procuring the execution of a certain deed of release (the purchaser's right to which had not been disputed), the Defendant was bound to accept a conveyance of the estate, and should pay the costs of the suit.

The Defendant appealed from his Lordship's decree.

Mr. *Wigram* and Mr. *R. Perry*, in support of the decree.

Mr. *Tinney* and Mr. *Bagshawe*, for the appeal, referred to *Deverell v. Lord Bolton* (a), *Freme v. Wright* (b), Sir *E. Sugden's Treatise on Vendors and Purchasers* (c), and also to the judgment of Lord *Lyndhurst* in *Dick v. Donald*. (d)

The material facts of the case, and the principal arguments urged in support of the decree, are stated and considered in the judgment.

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(a) 18 *Ves.* 505.

(b) 4 *Mad.* 564.

(c) Vol. i. pages 324. 368. 449.
550. 9th ed.

(d) 1 *Bligh*, 655. N. S.

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The LORD CHANCELLOR.

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Feb. 15.

This was a bill by a vendor for specific performance of a contract of purchase, and praying that the Defendant might be declared to have accepted the title.

The premises in question were put up to sale by auction on the 7th of *May* 1833, subject to certain conditions of sale. By the fourth of those conditions the vendor was to deliver an abstract of the title to the purchaser, or his solicitor, within twenty-one days of the day of the sale, and to deduce a good title; but as to certain lands allotted under an inclosure, the purchaser was not to be at liberty to require, and the vendor was not bound to shew any title thereto, prior to the award; from which period the title was to be deduced. The purchaser was, within the next twenty-one days after delivery of the abstract, to declare his acceptance or disapproval of the title; and if objection were made, the vendor was to be at liberty to vacate the sale and return the deposit. The fifth condition was that, upon payment of the remainder of the purchase-money, the vendor should convey the premises to the purchaser. The sixth was to the effect that the vendor should deliver up to the purchaser of the greater part in value of the estate all the title deeds, and copies of deeds, and other documents, in his custody, but should "not be bound or required to produce any original deed, or other documents than those in his possession and set forth in the abstract, or which relate to other property;" and such purchaser was to enter into the usual covenants for the production of the title deeds to the purchasers of the remaining lots; or if the largest part should remain unsold, then the vendor was to enter into such covenants, and retain the deeds, and the purchasers were to have attested copies of such deeds at their own expense.

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The abstract of title was not delivered within the twenty-one days, so that no question arises as to the time specified in these conditions of sale. The abstract, when delivered, stated deeds and instruments which, it is admitted, if duly verified, shewed a good title: but the question is, whether the vendor was bound to verify the deeds so abstracted, except so far as he had in his possession deeds enabling him to do so.

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In the margin of this abstract, against certain deeds of the 28th and 29th of *November* 1813, was a note in these words; — “An attested copy of these indentures will be produced, but not the originals, which are not in the possession or power of the vendor;” and in the margin of the abstract of another deed, of the 6th of *August* 1818, there was the following note; — “A copy of this deed will be produced, but not the original, which is not in the custody or power of the vendor;” and in the margin of the abstract of certain other deeds, of the 10th and 11th of *September* 1832, there was the following note; — “These deeds are not in the possession of the vendor and relate to other property;” and there was a similar note in the margin of the abstract of a deed, dated the 11th of *September* 1832.

A long correspondence took place between Mr. *Baker*, the solicitor for the vendor, and Mr. *Leake*, the solicitor for the purchaser, from the effect of which, coupled with the notes in the margin of the abstract, it is contended, that whatever may be the proper construction of the conditions of sale, the purchaser had bound himself to accept a conveyance which he had caused to be prepared, without any verification of the abstract; but the first question is, what were the rights of the parties under the conditions of sale, unaffected by what afterwards took place.

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The decree has declared that the Defendant is not entitled to have the abstract verified, except so far as the Plaintiff can verify the same by the production of the deeds and other documents in his possession; and it then declares that the Defendant is bound to accept the conveyance of the estate, executed as in the bill mentioned.

If this be the true result of the conditions of sale taken by themselves, it is obvious that, however good the title might appear to be upon the abstract, the purchaser could not be sure of having any proof whatever of such title; because, at the time of the purchase, he must be supposed to be ignorant of what deeds or documents were in the possession of the vendor, and the conditions give him no information upon the subject. The vendor might have had an abstract of a good title, and not one deed, or only some immaterial deeds, corresponding with the abstract. If, by these conditions, the vendor was protected from the necessity of verifying some of the material deeds deducing his title, he must have been equally protected from verifying any of the deeds whatever.

The case was necessarily argued for the respondent to this extent, that the conditions amounted to a declaration that the purchaser was to take such title as the vendor had, as was stipulated in *Freme v. Wright* (a): and undoubtedly a vendor may so stipulate; but he is bound, if such be his meaning, to make the stipulation intelligible to the purchaser. The purchaser, in such a case, cannot object to any infirmity in the title or in the evidence to verify it; but could a purchaser so understand a contract by which it was stipulated that the vendor

(a) 4 *Mad.* 364.

vendor should deliver an abstract, and deduce a good title? It may be said that "to deduce" means to draw out and exhibit a good title upon the abstract: but if the purchaser be not bound to verify any part of it, the deducing and exhibiting a good title upon paper would be mere mockery and delusion. The subsequent words of the fourth condition, however, put a construction upon this word "deduce," and prove that it means not only to exhibit upon paper, but to deduce and shew a good title; for it provides that as to certain allotted lands—and that by way of exception to the generality of the obligation to deduce a good title—the purchaser shall not be at liberty to require, and the vendor shall not be bound to shew, any title prior to the award, from which period the title shall be deduced. Can it then be doubtful whether the vendor, when as to the other lands he contracted to deduce a good title, did not so contract as to give to the purchaser a right to require, and to bind himself to shew a good title?

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Had this fourth condition stood by itself, there could not have been any doubt upon the subject: but it is said that the sixth condition destroyed the whole effect of the contract so contained in the fourth condition, and converted a positive contract for a good title into a contract under which the purchaser might be obliged to take the estate without any title at all, and certainly without any means of proving a title. If such be the effect of the sixth condition, why contract by the fourth condition to deduce and shew, thereby giving to the purchaser a right to require, a good title? Could it be the intention of the vendor to protect himself by one condition, from the obligation of performing that which, by a prior condition, he had contracted to do? Could any purchaser have so understood it?

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It is to be observed that the fourth, fifth, and sixth conditions follow the usual course of proceeding in completing a purchase. The fourth relates to the title; the fifth, to the payment of the purchase-money and the conveyance; and the sixth, to the delivery and custody of the title deeds. The latter provides that the vendor shall deliver to the purchaser of the largest portion of the estate, all the title deeds in his custody, but shall not be bound or required to produce any original or other documents than those in his possession, and set forth in the abstract, and which relate to other property. The exception is to the contract to deliver the title deeds. To the contract in the fourth condition to deduce and shew a good title, there is no limitation or restriction; but to the contract to deliver up the title deeds after the completion of the purchase, there is a restriction limiting the obligation to produce, to such only as the vendor had in his possession.

It was said that the word "produce" has a more general meaning than "deliver," and that it must therefore have been intended to apply to a production for the purpose of proving the abstract, and cannot be confined to production for the purpose of delivery. If the word, however, had been used in that sense, it would not have been confined to deeds in the possession of the vendor; because, for the purpose of proving the abstract, the production of deeds not in his possession, but of which he had the right or the means of procuring the production, would have been equally available. He must have intended to give the best proof of his title in his power; though he might have wished to guard against being called upon for more evidence in support of it, than he had at his command. He would therefore have stipulated that the purchaser should not, for that purpose, be entitled to call for any deeds which were not in his possession,

possession, or the production of which he had not the means of procuring. With reference to the latter class, a clause confining the liability to the producing of deeds in his possession would plainly have been inapplicable; though that would be the natural limit of the obligation as to delivering up deeds on the completion of the purchase. Apparently, the framer of these conditions did not advert to the difficulty in proving the title, arising from the want of some of the title deeds, and therefore did not guard against it; although he did think of protecting the vendor from the obligation to deliver up any deeds except such as were in his own possession.

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It by no means follows that the vendor cannot prove his title, because he has not in his possession all the deeds necessary for that purpose. It could not, therefore, have been inferred by the purchaser, that the restriction as to the liability to deliver up certain deeds, was to apply to the liability to produce them for the purpose of proving the title; and if that inference was not obviously to be drawn from the conditions, will a court of equity compel a purchaser to take the estate without a title?

For these reasons, I cannot think that upon the terms of the conditions alone, the purchaser was bound to complete his contract, until he had a good title deduced and proved, either by the production of the deeds professed to be abstracted, or by such other evidence as would satisfactorily prove the statements in the abstract to be correct.

Assuming that to be so, I have next to consider whether the notes in the margin of the abstract, coupled with the correspondence, deprive the purchaser of this right. The abstract professes to give the substance

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of various instruments, which it was admitted, if truly abstracted, shew a good title; but the marginal notes in the abstract, when delivered, informed the purchaser that the originals of certain deeds were not in the possession or power of the vendor, but that attested copies would be produced. It by no means follows from this, that the most distinct and positive evidence might not be furnished of the existence and contents of those deeds. The earliest of them are of so late a date as the year 1813; the attesting witnesses may be forthcoming, and it may be known in whose possession the originals are. Much the same observations apply to the notes with respect to the deeds of *August* 1818, and those of *September* 1832. The note as to the latter merely is, that they are not in the possession of the vendor; but they may be in his power, and they are of so recent a date, that it is scarcely possible that any difficulty should exist in proving their existence and contents. These notes certainly informed the purchaser that he was not to expect to have those deeds delivered up to him upon the completion of his purchase; but did they inform him that the vendor was unable to give any proof of the existence or contents of documents set out in his abstract, and upon which his title depended?

It was then said that the effect of the correspondence between the respective solicitors of the parties, amounted to an acceptance of the title. If a purchaser accepts a title, he accepts it both as to law and fact. He agrees to take it as it stands, and he can no more object that it is not proved, than he can that it is not good in law. The decree, however, does not proceed upon any such ground. On the contrary, it assumes that the purchaser is entitled to have the abstract verified, so far as the Plaintiff can verify the same, by the production of deeds and other documents in his possession; and although it

it assumes that this verification has not taken place, it decrees the purchaser to accept the conveyance. My present observation, however, is confined to this, that the decree does not proceed upon the ground that the purchaser had accepted the title; but that by the contract, the vendor was bound to verify the title only to a certain extent, and in a particular manner. So that if it should now appear that the letters amounted to an acceptance of the title, it will be a new point, and one not constituting any part of the ground upon which the decree stands.

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Before I examine the letters, it must be considered in what position the parties stood, according to my construction of the conditions of sale. The purchaser conceived himself entitled to have a good title made out; but he knew that his right to have a delivery of the title deeds was limited by the sixth condition. He saw upon the abstract a good title stated; but he was told by the notes that of certain deeds he could not have the possession. The question then upon the letters will be, whether the purchaser waived all proof of the abstract, which would amount to an acceptance of the title, — for he certainly accepted it, if proved as stated, — or whether, according to the terms of the decree, he waived all proof except so far as the vendor might be able to afford such proof from the deeds and documents in his possession.

[His Lordship here entered into a minute examination of the various passages in the correspondence upon which the Plaintiff had relied as constituting or evidencing an acceptance of the title by the Defendant. His Lordship then proceeded as follows:—]

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I cannot find any thing in these letters amounting to a new contract as to the deeds, or to any waiver of such right as the purchaser had with respect to the deeds under the original agreement. It appears to me, that all the parts of this correspondence, relied upon by the vendor as evidence of the purchaser having waived his right to have the abstract verified, were written under an expectation of having the abstract verified by an inspection of the title deeds, or some evidence of their existence and contents, before the completion of the purchase; and that the vendor's solicitor was fully informed, in *September 1833*, of the existence of this expectation, and did not say or do any thing to remove this impression till the letter of the 9th of *August 1834*, after his client had been called upon to execute a covenant for the production of the title deeds. The evidence of the Defendant's solicitor confirms this, but does not carry the case further than the letters.

Such being the view which I take of the transactions subsequent to the sale, it follows that the opinion I have expressed of the effect of the contract then entered into under the conditions of sale, must regulate my judgment upon the whole case. I am satisfied that there was nothing in the conditions of sale sufficient to lead the purchaser to understand that he would have no right to have any evidence of any title to the land sold, unless the vendor should happen to be in possession of deeds sufficient for that purpose, — a circumstance of which the purchaser could know nothing.

Whether that was the intention of the vendor or not, is immaterial, if he did not take proper measures to explain such intention to the purchaser. To state in the conditions of sale, that the vendor would deliver
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an abstract of title, and deduce a good title, except as to certain allotted lands, as to which he was not to be bound to shew a good title prior to the award, from which period he was to deduce the title, was not the mode of informing a purchaser that he was not to require any evidence whatever of title to any part of the property, except such as the vendor might have the means of proving from deeds which might be in his possession, and which might amount to nothing.

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The doctrine of Lord *Lyndhurst* in *Dick v. Donald (a)*, is much in conformity with my view of this case. It is, therefore, impossible for me to concur in the opinion, that the purchaser has no right to have the abstract of the title verified, except as far as the vendor can verify the same, by the production of the deeds and other documents in his possession. Instead of that declaration, I must declare that the purchaser has accepted the title as set forth in the abstract, subject to the same being verified, and direct a reference to the Master to inquire and state, whether the vendor can make out and verify the title set forth in the abstract delivered to the purchaser.

(a) 1 *Bagh*, p. 661. *N. S.*

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E. and *F.* entered into a joint and several bond, of which the condition was, that if they or either of them, their or either of their heirs, &c. duly paid an annuity to *B.* for his life in manner following; viz. one moiety thereof by *E.* during her life, and the other moiety thereof by *F.*, his executors or administrators, during the life of *E.*, and after the death of *E.*, the whole by *F.*, his heirs, executors, or administrators, during the life of *B.*, then the bond should be void: Held, that the liability under this bond was joint and several, and that *F.* having failed, after the death of *E.*, in paying the annuity, the estate of *E.* was liable on his default.

UNDER the decree in this suit, which was instituted for the purpose of administering the estate of the testatrix *Elizabeth King*, who died in the month of *February* 1826, the Defendant, *William Booty*, carried in a charge, as a specialty creditor, for the sum of 4995*l.*

This sum was the amount of the penalty which, by a bond bearing date the 25th of *March* 1803, the testatrix and the Defendant *Frederick Benjamin King*, jointly and severally bound themselves and their several heirs, executors, and administrators, to pay to *William Booty*, his executors, administrators, or assigns. The condition annexed to the bond recited that *Philip King*, late of *Camberwell*, deceased, had in his lifetime suggested to *William Booty* that he intended, by his will, to make some provision for him, (*Booty*) in consequence of the various disappointments he had met with as to preferment in the church; but upon the decease of *Philip King* it appearing that he had omitted to make such provision, and *Elizabeth King* and *Frederick Benjamin King* being desirous, from sentiments of respect and regard to the memory of *Philip King*, to carry into effect every wish and intention he had in his lifetime expressed, they had proposed and agreed to secure to *Booty* an annuity of 370*l.* for his life. The condition of the bond was declared to be that if *Elizabeth King* and *Frederick Benjamin King*, or either of them, their or either of their heirs, executors, or administrators, should well and truly pay, or cause to be paid, unto *William Booty* and his assigns, during his life, one annuity of 370*l.* in the proportions and manner follow-

following; that is to say, the sum of 185*l.* per annum, part thereof, by *Elizabeth King*, during the term of her natural life, if *William Booty* should so long live; and the like sum of 185*l.* per annum, residue thereof, by *Frederick Benjamin King*, his executors or administrators, during the natural life of *Elizabeth King*, if *William Booty* should so long live as aforesaid; and from and after the death of *Elizabeth King*, if *William Booty* should survive her, then if *Frederick Benjamin King*, his heirs, executors, or administrators, or some or one of them, should well and truly pay, or cause to be paid, unto *William Booty* and his assigns, during the remaining time of his natural life, the whole of the annuity of 370*l.*; and also if such annuity of 370*l.* should be paid to *William Booty* and his assigns, during his life, without any deduction or abatement, by equal portions, on the 19th day of *November* and the 19th day of *May*, in each year, during the life of *William Booty*, then the bond to be void, or else to remain in full force and virtue.

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It appeared from the affidavit in support of the charge, that the annuity was regularly paid up to the 19th of *May* 1829, from which time it was suffered to fall into arrear; and that *Frederick Benjamin King* having become a bankrupt in the month of *October* in that year, *Booty* proved against his separate estate for the sum of 1482*l.*, as the estimated value of the annuity for his life, and afterwards received from the bankrupt's estate the sum of 395*l.* 4*s.*, being a dividend of 5*s.* 4*d.* in the pound on the amount of such proof.

The affidavit of *Frederick Benjamin King*, filed in support of the counter-state of facts carried in by the Plaintiffs, stated that *Philip King* was the uncle, by marriage, of the deponent *F. B. King*, and the brother-in-

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law of *Booty*, and that *Philip King* left to the deponent and his children very considerable property by his will, and also, in his lifetime, contributed greatly to the comfort of *Booty*: That upon the death of *Philip King*, which took place on the 1st of *March* 1803, *Booty*, who had lived in habits of great intimacy with him, affected to be much disappointed that his will contained no disposition in his favour, and alleged that *Philip King* had promised to promote his interest in the church: That many conversations arose in the family upon the subject; and that *Booty*, having urged his sister *Elizabeth King* and the deponent to make some permanent provision for him, the deponent and his late aunt, *Elizabeth King*, who was the widow of *Philip King*, agreed to make a provision for *Booty*, during his life, of \$70*l.* a year, whereof *Elizabeth King* agreed to pay one moiety during her life, and the deponent agreed to pay the other moiety during the joint lives of himself and *Elizabeth King*; and that the deponent agreed that on her decease he should bear the whole burthen of the annuity. The affidavit further stated, as the reason for this arrangement, that *Elizabeth King* had only a life interest in her husband's property, and could not be expected to do more than give up a portion of such income to *Booty*; while deponent would, upon her death, become possessed of the whole capital, to a very large amount, then vested in her late husband's trade, and would, therefore, be fully enabled to provide for the entire payment of the annuity: That *Booty* was aware of the exact circumstances and situation of each party, being himself one of *Philip King*'s executors, and was also fully informed of the arrangement, and knew that *Elizabeth King* did not intend to be liable to the payment of any part of the annuity beyond the period of her own life: That such intention of *Elizabeth King* and the deponent was fully expressed to *Booty*; and the same being well under-

understood, the deponent gave verbal instructions to his then solicitor, (who, many years ago, left this country for *New South Wales* and never returned,) to prepare a proper instrument for carrying such arrangement into effect: That the solicitor was fully informed of the aforesaid intention, and was particularly instructed to limit the deponent's and *Elizabeth King's* liability, in the manner before stated; and he was desired to do so, upon a full and perfect understanding of all the circumstances of the family, and the nature of the interest which they had acquired under the late *Philip King's* will; and that under these circumstances the bond in question was prepared accordingly: That during the lifetime of *Elizabeth King* one moiety of the annuity was always regularly paid by her, and one moiety by the deponent; but that since her decease, and up to the month of *October* 1829, when the deponent became a bankrupt, the whole of the annuity was paid to *Booty* by the deponent alone.

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The affidavit of *William Booty*, in reply, stated that *Philip King* had in his lifetime not only promised to promote the interest of the deponent, but had actually taken steps towards purchasing a living for him; but that the execution of his purpose was eventually postponed in consequence of there being no eligible preferment in the market at the time: That the proposal of granting an annuity to the deponent was the spontaneous act of *Elizabeth King*, and was not the result of his solicitations: That although she had only a life income in the property derived from her husband, such income amounted to 1400*l.* a year and upwards: That *Elizabeth King*, knowing the wish and intention of *Philip King*, her deceased husband, to purchase a living for the deponent, in order that such wish and intention might not be frustrated in consequence of her husband's

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band's death, asked the deponent what sum would satisfy him as a yearly income for his life, to which the deponent replied \$704; and that the bond for securing an annuity of that amount to the deponent was thereupon prepared and executed. The affidavit expressly denied that the deponent knew, or that he had the least notion that *Elizabeth King* intended only to give up a part of her life income to the deponent, and not to be liable to the payment of any part of the annuity beyond the period of her own life. On the contrary, the deponent positively said, that he always understood and believed that the annuity was to be paid by one or other of them, *Elizabeth King* and *Frederick Benjamin King*, during the life of the deponent at all events; and that in case of default by either of them, the same was to be payable by the other of them; and that such was the wish and intention of *Elizabeth King*, as it certainly was the understanding of the deponent, at the time when the bond was executed.

The Master having disallowed the claim, exceptions were taken to his report. The Vice-Chancellor overruled the exceptions, and *Booty* thereupon appealed.

Mr. *Wigram* and Mr. *Chandless*, for the exceptions.

The Master and the Vice-Chancellor were both of opinion, that upon the terms of the bond no valid debt was constituted against the estate of *Elizabeth King*, inasmuch as the whole of the annuity had been duly paid so long as that lady lived; and the question raised by the affidavits with respect to the intention of the parties was not gone into at all. That opinion is founded on a misconception of the language and effect of the instrument. The bond is in its form joint and several, and the penalty is to be paid by either of the obligors
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and their respective heirs, executors, &c., if there is a failure in the performance of any part of the condition. After reciting that the purpose and agreement of the parties is, to secure to the obligee for his life an annuity of 370*l.*, (a recital which, if any doubt could exist as to the meaning of the bond, would effectually remove it,) the condition is declared to be that *Elizabeth King* and *F. B. King*, or either of them, shall pay to *Booty* during his life an annuity of 370*l.* The subsequent clause, as to the mode of payment, is nothing more than an arrangement by the co-obligors as between themselves, for their mutual convenience; and cannot affect the right of the obligee to receive the whole of that for which he stipulated, namely, the full annuity so long as he lived, and to secure which the obligors bound themselves jointly and severally in a penalty. Unless the annuity was duly paid to *Booty* during his life without deduction or abatement, the obligation was to remain in full force; and the surviving obligor having failed to pay it, the bond has become forfeited, and *Mrs. King's* estate is liable at law for the amount of the penalty, although under the clause in the condition regulating the mode of payment, as between the co-obligors, or upon the general principles of equity as applied to sureties, her representative may still have a remedy over, against *F. B. King*, notwithstanding his bankruptcy. For that reason, however, *Mr. King* is an interested witness; and his affidavit, supposing it to be material, would not be admissible. Even if the bond had been of a suspicious or fraudulent character, (although there is nothing before the Court to raise even a *prima facie* case of that kind,) the Court cannot refuse to give its legal effect to a solemn instrument, until that instrument has been impeached and declared void by a distinct and substantive proceeding: still less, will it permit a bond constituting at law a valid ob-

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ligation to be rejected as the foundation of a claim of debt in the Master's office, on the ground that its form is singular, and at the distance of more than thirty years from its date, not capable of being fully explained. The allegations in the affidavit of *F. B. King*, so far as they are material, are distinctly and expressly negated by the counter-affidavit of the creditor.

Mr. Jacob and Mr. Bethell, contra.

This bond upon the face of it is of a singular and suspicious kind; it is admitted to be purely voluntary; and its peculiar form is only to be explained by the circumstances stated in *Mr. F. B. King's* affidavit. With that explanation every part of it becomes consistent and intelligible, and the transaction itself appears at once simple and natural. The question of construction is, to say the least of it, extremely doubtful. The Court below thought, that even upon the terms of the instrument, the Defendant *Booty* could establish no debt against *Mrs. King's* estate: and if the evidence as to the nature of the transaction and the intention of the parties is looked at,—as it clearly may, wherever a mistake has been committed in the form of an instrument, or ambiguity and apparent inconsistency are found in its provisions,—it is impossible to deny that the Court came to the right conclusion; *Bishop v. Church* (a), *Thomas v. Frazer* (b), *Burn v. Burn* (c). Whenever a claim founded on a written instrument is set up, and effect is sought to be given to it, either upon a direct proceeding in Court or before the Master, it is fully competent to those who are interested in resisting that claim, to shew by evidence *aliunde* that the instrument has been framed erroneously, and does not follow the instructions

(a) 2 Ves. sen. 100. 571.

(b) 5 Ves. 399.

(c) 5 Ves. 575.

instructions or express the meaning of the parties who executed it. Nor will the Court in the face of such evidence allow the instrument to operate otherwise than according to the real agreement and intent of the parties, however it may refuse to annul or to reform it without a bill being filed for the purpose. If the claim were good against *Elizabeth King's* estate, the alleged right to contribution or to relief, under the clause with respect to the mode of paying the annuity, must have constituted a debt proveable under *F. B. King's* commission, and be now barred by his certificate. Mr. *F. B. King* therefore, has really no interest, and his affidavit is perfectly admissible; but if that were otherwise, the objection comes too late, since no exception to the report has been taken upon that ground. The affidavit of the claimant is a form required by the practice of the Court in support of every debt sought to be recovered in the Master's office under a decree; but where it is met and contradicted by other affidavits, its statements go for nothing and are not evidence.

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Mr. *Wigram*, in reply.

The LORD CHANCELLOR.

If I were to support the order under appeal, I should in effect be declaring that I am quite satisfied there is no valid claim under this bond; whereas the only effect of allowing the exception will be to refer the matter back to the Master to inquire further into the claim.

As to the question of construction, I entertain not the slightest doubt that upon the terms of the bond, the estate of *Elizabeth King* is legally liable to the claim made against it. It was not very easy, perhaps, to have

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framed an instrument which should not be open to some objection; for the arrangement itself was rather complicated. According to the case set up by the Defendant *King*, that arrangement was that *Mrs. King* should be liable for 185*l.* (a moiety of the annuity) during her own life only. If on the other hand both obligors were to be liable to *Booty* for the whole, but as between themselves, each was to bear a moiety only, there were then two contracts to be expressed in the bond, one as between the obligors and *Booty*, and another and subordinate one, as between the parties themselves. Now if the understanding and agreement had been that *Elizabeth King* was to be answerable for the 185*l.* during her own life only, she ought to have had nothing at all to do with the contract of *F. B. King*. If that was really her meaning, it is very strange that she should make herself liable to a penalty of 4995*l.* for the breach of a contract, with which, according to the argument against the exceptions, she was to have no concern, except as to a moiety of the annuity during her life. Nor is it conceivable that the condition could be introduced into the bond by the person who framed it, unless he understood and believed that in the event of a failure in the payment at any time, *Mrs. King* or her estate was to be liable for the whole.

Upon this legal obligation, therefore, if it stood alone, there can be no doubt that the Master came to a wrong conclusion. How then does the matter stand upon the evidence adduced before him, for the purpose of impeaching the claim? In the first place I find it stated in *Mr. King's* affidavit, that the deponent and *Elizabeth King* agreed to make a provision for *Booty*, of which, as the affidavit proceeds to state, *Elizabeth King* agreed to pay one moiety, and the deponent agreed to pay the other moiety, and on her decease to bear the whole burthen.

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burthen. Now upon this, it may be observed, that the deponent does not state with whom the agreement was made, nor to what part of it *Booty* was a party. The whole, for ought that is here sworn, might have been an arrangement as between the obligors themselves. The affidavit then goes on to state the reason why the parties entered into this arrangement—a circumstance which for the present purpose is immaterial; and that *Booty* was fully informed of the aforesaid arrangement, not specifying, however, when, or by whom, or in what manner he was so informed. Such as it is, however, the arrangement which the deponent speaks of is quite consistent with the case made on behalf of the obligee, namely, that *Booty* should have the full annuity of 370*l.* during his life, and at all events. This is quite consistent with the supposition that the parties, as between themselves, should bear the burthen in certain proportions settled between themselves. *Booty's* affidavit positively denies his having known or believed that the intention of *Elizabeth King* was only to give a portion of her life income. The affidavit of Mr. *King* proceeds to state that this intention having been fully expressed to *Booty*, and the same being well understood, he then gave instructions to a solicitor accordingly,—a fact, which as *Booty* was no party to those instructions, is perfectly immaterial. Mr. *Booty* himself positively swears that he had no such understanding.

Under these circumstances, the question is, whether upon such evidence the Court shall act against the clear legal effect of this obligation. That question I have not the least hesitation in answering in the negative. When the Court is called upon to act in opposition to the legal effect of an instrument, it always requires the clearest and most distinct evidence; and certainly such evidence has not been produced in this case.

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I am therefore of opinion, that if the Master rejected this claim upon the construction of the bond, he made an erroneous decision in point of law; and if he rejected it upon the facts disclosed by the affidavits, I think the facts were not such as to justify his conclusion. The exception must be allowed.

Jan. 30.

Feb. 9, 10.

Dec. 16.

THORNTON v. BRIGHT.

A real estate was settled to the use of a father for life, with remainder to the use of all and every or such one or more of his children, for such estate and estates, and in such parts, shares, and proportions, and with such limitations over, and charged with such annual or gross sums, such limitations over and charges to be to or for the benefit

BY the settlement made in contemplation of a marriage between *Samuel Heywood*, barrister-at-law, afterwards Serjeant *Heywood*, and *Susannah Cornwall*, afterwards *Susannah Heywood*, dated the 26th of December, 1780, and a common recovery duly suffered in pursuance thereof, the whole townland and hereditaments of *Ballygrubane* in the county of *Armagh*, in *Ireland*, were settled and assured (subject to life estates therein to the father and mother of *Samuel Heywood*) to the use of *Samuel Heywood* for life, with remainder to trustees to preserve, &c.; with remainder to the use of *Susannah Cornwall* his intended wife for life; with remainder to the use of all and every or such one or more of the child or children of the body of *Samuel Heywood* on the body of *Susannah Cornwall* to be begotten, whether male or female, for such estate

of the same children, some or one of them, and in such manner and form as the father should appoint. The father afterwards appointed the estate to trustees and their heirs, upon trust to pay the rents and profits thereof to his daughter, who was a married woman, for her sole and separate use during the life of her husband, without power of anticipation: Held, that the appointment of the estate to trustees for the separate use of the daughter during the joint lives of herself and her husband was a valid exercise of the power.

estate and estates, and in such parts, shares, and proportions, and with such limitations over, and charged with such annual or gross sums, such limitations over and charges to be to or for the benefit of the same children, some or one of them, and in such manner and form, as *Samuel Heywood*, at any time or times during his life, by any deed or deeds, writing or writings, or by his last will and testament in writing, executed and attested as therein mentioned, should direct, limit, or appoint; and in default of such direction, limitation, or appointment, and as to such parts of the same estate whereof no such direction, limitation, or appointment should be made, to the use of the first and other sons of the marriage, successively, in tail male; with remainder to the use of the daughters of the marriage equally, as tenants in common, in tail general, with cross remainders between them; and in case all such daughters but one should die without issue, or there should be but one such daughter, then to the use of such one surviving or only daughter and the heirs of her body, with the ultimate remainder to the use of *Samuel Heywood*, his heirs and assigns for ever.

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The settlement contained a covenant by the father of *Susannah Cornwall* that he would, within a month after the marriage, transfer into the names of the trustees of the settlement the sum of 300*l.* per annum Bank Long annuities, upon certain trusts for the benefit of the intended husband and wife for their respective lives, and subject thereto, upon trust, as to 200*l.* of such annuities, for all or such one or more of the children of the marriage, and in such shares and proportions, manner and form, and at such ages, as *Susannah Cornwall* should, if she survived her intended husband, as therein mentioned appoint; and as to the remaining 100*l.* of such long annuities, and also, in case the husband should survive the

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wife, as to the said sum of 200*l.* of such annuities, upon trust for all or such one or more of the children of the marriage, in such parts, shares, and proportions, and at such age or ages, and subject to such powers and limitations, such limitations to be for the benefit of the children, as the husband should by any deed or writing, or any last will and testament executed and attested as therein mentioned, direct or appoint; and in default of such direction or appointment, or as to so much of the said sums of 200*l.* and 100*l.* as should not be so directed or appointed, upon trust for all the children of the marriage equally, the shares of sons to vest and to be assigned to them at twenty-one, and of daughters at twenty-one or marriage, which should first happen, after the decease of the husband and wife; with benefit of survivorship and accruer with respect to the shares of such of the children as should die before they should have taken vested interests.

The marriage took effect; and, in pursuance of his covenant, *John Cornwall*, the father of Mrs. *Samuel Heywood*, thereupon transferred into the names of the trustees the sum of 300*l.* per annum Long annuities, upon the trusts of the settlement. There were issue of the marriage several children, of whom three only, namely, *Phoebe Augusta Heywood*, *Anne Heywood* (afterwards the wife of *William Granville Eliot*), and *Mary Isabella Heywood*, lived to attain the age of twenty-one.

Under the will of *John Cornwall*, two several sums of 3000*l.* and 2000*l.* were afterwards laid out by the trustees in the purchase of Bank Long annuities, and held by them upon the same trusts as the 300*l.* per annum like annuities originally settled; and the whole amount of the Bank Long annuities included in the settlement was thereby increased to the sum of 552*l.* 1*s.* 9*d.* per annum.

By

By indentures of settlement, dated the 4th and 5th of *January* 1815, and made in contemplation of a marriage between *Anne Heywood*, the daughter of *Samuel Heywood*, and *William Granville Eliot*, after reciting (among other things) that *Anne Heywood* was entitled, under the settlement of the 26th of *December* 1780, after the decease of *Samuel Heywood* and *Susannah* his wife, in case no appointment was made to the contrary, to a vested interest in one third share of 55*l.* 1*s.* 9*d.* per annum Bank Long annuities; and that she was also, by virtue of the said settlement and of a common recovery suffered in pursuance thereof, and of a certain deed poll of appointment dated the 3d of *January* 1815, and duly executed by *Samuel Heywood* in pursuance of his power contained in the settlement, from and after the decease of *Samuel Heywood* and *Susannah* his wife, entitled to her and her heirs for ever, to one equal undivided third part of and in the townlands and hereditaments of *Ballygrubane*; and reciting that, upon the treaty for the intended marriage, it was agreed that such third part of the said hereditaments and premises should be conveyed, and the said one third of the Bank Long annuities assigned, to trustees, upon the trusts, and subject to the provisoes, declarations, and agreements after mentioned; she, *Anne Heywood*, with the privity and consent of her intended husband, thereby conveyed and assured to certain trustees therein named and their heirs, all that her undivided third part of and in the townland of *Ballygrubane*, to hold the same with the appurtenances unto the said trustees, their heirs, and assigns (subject nevertheless to the several life estates of *Samuel Heywood* and *Susannah* his wife therein) to the use, after the marriage, of *William Granville Eliot* and his assigns for life, without impeachment of waste; with remainder to trustees to preserve, &c.; with remainder to the use of *Anne Heywood*, his intended wife, for life; with remainder to the

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use of the children of the marriage, in such manner, and subject to such appointment as therein mentioned; and in default of appointment, to the use of the first and other sons of the marriage successively in tail male; with remainder to the daughters of the marriage equally as tenants in common in tail general; with cross remainders amongst such daughters; with the ultimate remainder to the use of *Samuel Heywood*, his heirs and assigns for ever. And *Anne Heywood*, with the like consent and approbation, thereby assigned to the same trustees, their executors, administrators, and assigns, all that her equal undivided third part of the sum of 552*l.* 1*s.* 9*d.* per annum Bank Long annuities, to hold the same upon trust (after the decease of the survivor of *Samuel Heywood* and *Susannah* his wife) to pay the dividends thereof to *William Granville Eliot* for his life, and after his death to pay the same to *Anne Heywood*; and after her death, to make over the same one third of the said funds and the dividends thereof to the children of the marriage in such manner and subject to such power of appointment as therein mentioned.

This settlement also contained a covenant by *William Granville Eliot* that in case *Anne Heywood*, or *William Granville Eliot* in her right, should, at any time during her coverture, become entitled, by survivorship or otherwise, to any further share or interest in the said townland and hereditaments, or any further sum in the Long annuities, or to any other money, estates, or effects, by virtue of any gift, bequest, or otherwise, of any of her relations or friends, exceeding the value of 50*l.*, he, *William Granville Eliot*, would, within a month after she or he in her right, should become so entitled, unless otherwise expressly ordered or appointed by the deed or will under which she should become entitled thereto, convey, assign, pay and make over the same to the

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the trustees of the settlement for the time being; as to such part thereof as should be of the nature of real estate, to the several uses thereinbefore mentioned concerning the third part of the townland and hereditaments thereby granted and released; and, as to such part thereof as should be of the nature of personal estate, upon the several trusts therein expressed and declared concerning the Bank Long annuities thereby assigned. And *Samuel Heywood*, thereby, for himself and for *Susannah* his wife, covenanted with the trustees that neither he nor his wife would at any time in virtue of their respective powers, make any appointment of any part of the sum of 552*l.* 1*s.* 9*d.* Bank Long annuities that should lessen or diminish the one third share thereof to which *Anne Heywood* was entitled, and thereinbefore assigned by her.

The marriage between *William Granville Eliot* and *Anne Heywood* was duly solemnised; and there were issue of the marriage two surviving children only, both of whom are infants. In the month of *January* 1822, *Susannah Heywood* died, and was survived by her husband, and their three daughters. *Mary Isabella Heywood*, one of those daughters, died in *October* 1822, unmarried and intestate, and her father, *Serjeant Heywood*, took out administration to her estate. The trustees of *Serjeant Heywood's* marriage settlement, conceiving that *Mary Isabella Heywood*, in default of appointment, took a vested interest in one third of the sum of 552*l.* 1*s.* 9*d.* per annum Bank Long annuities, subject to her father's life interest therein, shortly afterwards sold out that third (being 184*l.* 0*s.* 7*d.* per annum) and paid over the proceeds to *Serjeant Heywood*, as the administrator of his deceased daughter. The amount of the Long annuities standing in the names of the trustees was thus reduced to the sum of 368*l.* 1*s.* 2*d.* per annum.

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On the 15th of *June* 1826, Serjeant *Heywood* made his will, which was executed and attested as required by the power contained in his marriage settlement. By that will, after reciting, among other things, that, by virtue of a deed poll, dated the 3d of *January* 1815, and executed in pursuance of the power contained in his marriage settlement, and by the settlement made on the marriage of his daughter *Anne*, one equal third of the townland of *Ballygrubane* had been settled and limited as therein mentioned, and that one third of the Bank Long annuities to which his said daughter was then presumptively entitled was assigned to her trustees upon the trusts therein mentioned; and further reciting the receipt by the testator of the proceeds of the sum of 184*l.* 0*s.* 7*d.* per annum Bank Long annuities, as administrator of his deceased daughter *Mary Isabella*, and that 184*l.* 0*s.* 7*d.* being one moiety of the remaining sum of 368*l.* 1*s.* 2*d.* per annum Bank Long annuities was, by virtue of his covenant in the marriage settlement of his daughter *Anne*, to be transferred, upon his decease, to the trustees of her settlement; and that he had a right to appoint the remainder of the Bank Long annuities, under the power reserved to him in his own marriage settlement; the testator, in pursuance and execution of that power, and of all other powers in him vested, directed and appointed the remaining two thirds of the estate of *Ballygrubane*, to the use of *Richard Bright* and *Benjamin Heywood* and their heirs, and also appointed to the same trustees, their executors, administrators, and assigns, the sum of 184*l.* 0*s.* 7*d.* Bank Long annuities, being the remaining third of such Long annuities, upon trust, out of the rents of the two thirds of *Ballygrubane*, and the dividends or income of the Long annuities, yearly to pay unto or for his daughter *Phæbe Augusta Heywood*, during her life, for her own use and benefit, such sums of money, not exceeding in any one year 300*l.*, as his trustees
and

and his daughter *Anne Eliot* might think most for her advantage. And the testator directed that the annual surplus, if any, of such rents and dividends should be paid to his daughter *Anne Eliot* for her separate use, free from the control of her then present or any future husband, during the joint lives of herself and *Phæbe Augusta Heywood*, and that her receipt alone, notwithstanding her coverture, should be a sufficient discharge to the trustees; and in case of the death of *Anne Eliot*, during the life of *Phæbe Augusta Heywood*, then such annual surplus was to be paid to such person or persons as should be the heir of the body of *Anne Eliot* for the time being. And after the decease of *Phæbe Augusta Heywood*, in case *Anne Eliot* and her then present husband should be then living, upon trust to pay the whole of the rents and profits of the two thirds of *Ballygrubane* into the proper hands of *Anne Eliot*, or such person or persons as she should by writing appoint, for her sole and separate use, and free from the control of her then present husband; and her receipt alone, notwithstanding her coverture, was to be a sufficient discharge to the trustees; but *Anne Eliot* was not to be at liberty to assign or appoint such rents and profits by anticipation, or before they became actually due. And in case *Anne Eliot* should survive her then present husband, then the testator, from and after his decease, and the decease of his daughter *Phæbe Augusta Heywood*, appointed the said two third parts of *Ballygrubane* to *Anne Eliot* and the heirs of her body. But in case *Anne Eliot* should die in the lifetime of her said husband and of *Phæbe Augusta Heywood*, the testator thereby willed that *Anne Eliot* should have full power to give or appoint, after the decease of *Phæbe Augusta Heywood*, the whole or any part of the two third parts of *Ballygrubane* to all or any one or more of her children who might survive her, for such estate

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estate and estates, upon and for such trusts, and in such manner and form as, notwithstanding her coverture, she, by her last will and testament in writing, or any codicil thereto, executed and attested as therein mentioned, should direct or appoint; and in default of such direction or appointment, then the testator directed and appointed the same unto the heirs of the body of *Anne Eliot*. And the testator thereby also directed that, from and after the decease of *Phæbe Augusta Heywood*, the income of the Bank Long annuities should be paid to *Anne Eliot* for her separate use, during the joint lives of herself and her then present husband; and in case she should survive her husband, that the capital of the Bank Long annuities should be transferred to her for her own use; but in case she should die in her husband's lifetime, then, after her decease, the trustees were directed to transfer the capital of such Long annuities to such person or persons and in such manner and form as *Anne Eliot* should, notwithstanding her coverture, by her last will and testament in writing, or any codicil, executed and attested as therein mentioned, appoint; and in default of such appointment, unto her executors or administrators as part of her personal estate. *Richard Bright* and *Benjamin Heywood* were appointed the executors of the will.

Serjeant *Heywood* died in the month of *September* 1828, leaving his daughters *Phæbe Augusta Heywood* and *Anne Eliot* his co-heiresses at law and only next of kin. *Phæbe Augusta Heywood* died in the month of *June* 1832, unmarried and intestate, leaving *Anne Eliot* her heiress at law and only next of kin.

The bill was filed by the trustees of Serjeant *Heywood's* marriage settlement against the trustees and executors of the Serjeant's will, (one of whom had also
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obtained letters of administration *de bonis non* of *Mary Isabella Heywood*) against Mr. and Mrs. *Eliot*, their infant children, and the trustees of their marriage settlement, and against the personal representative of *Phæbe Augusta Heywood*; and it prayed that the rights of the several parties in the property which formed the subject of the settlement of *December 1780*, might be ascertained and declared.

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By the decree of the Vice-Chancellor, made at the hearing of the cause, it was, among other things, declared that the settlement of the 5th of *January 1815*, made on the marriage of *William Granville Eliot* and *Anne Heywood*, was a valid appointment of one third of the 552*l.* 1*s.* 9*d.* per annum Bank Long annuities; and that the one third of the sum of 552*l.* 1*s.* 9*d.* per annum Bank Long annuities, amounting to 184*l.* 0*s.* 7*d.*, per annum like annuities, sold out in the lifetime of *Samuel Heywood*, and the proceeds whereof were paid to him, was unappointed; and that one third of such last mentioned third vested in *Anne Eliot*, one other third in *Phæbe Augusta Heywood*, and the other third in *Mary Isabella Heywood*; and that *Anne Eliot* became entitled, as the next of kin of *Phæbe Augusta Heywood* to her said one third of a third, and that the two thirds of a third, to which *Anne Eliot* so became entitled, were liable to be settled under the covenants contained in her marriage settlement; and that under the appointment contained in the will of *Samuel Heywood*, *Anne Heywood* became absolutely entitled for her separate use to the remaining one third of the sum of 552*l.* 1*s.* 9*d.* per annum Bank Long annuities; and that she was not bound to settle the same. And it was further declared that the appointment contained in the will of *Samuel Heywood*, as to the two thirds of the real estate of *Ballygrubane*, to the trustees for the separate use of
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Anne Eliot, was invalid; but that the appointment of the same two thirds by that will to *Anne Eliot* in tail was a valid appointment; and that under the covenants contained in her marriage settlement, she was bound to settle the same to the several uses in the settlement expressed concerning the one third of the hereditaments and premises thereby granted and released; and that *Anne Eliot* should convey the same to the trustees of her marriage settlement, and settle the same accordingly; and that the trustees of Serjeant *Heywood's* will should pay to *William Granville Eliot*, as being entitled thereto under the settlement, a moiety of the rents received by them, and which became due after the decease of *Samuel Heywood*, and prior to the decease of *Phæbe Augusta Heywood*, in respect of the two undivided thirds of the said real estate, and also the entirety of the rents of the same two undivided thirds which had accrued due, and had been received by them since the death of *Phæbe Augusta Heywood*.

The Defendant Mrs. *Eliot* appealed against so much of the Vice-Chancellor's decree, as declared the appointment of two thirds of the estate of *Ballygrubane* to be void, and against the consequential directions.

The *Solicitor-General* and Mr. *Lovat*, in support of the appeal.

Under the very general and comprehensive terms of the power contained in the settlement of 1780, the appointment by Serjeant *Heywood's* will, of the two thirds of the estate of *Ballygrubane* to trustees, for the separate use of Mrs. *Eliot* during her coverture, was a valid exercise of the power. So far as the appointment purports to empower Mrs. *Eliot*, in case she should die in the lifetime of her husband and of *Phæbe Augusta Heywood*, to make

make a provision for her surviving children out of the estate, after the decease of *Phæbe Augusta*, and directs and appoints the estate, in default of such provision being made, to the heirs of the body of Mrs. *Eliot*, it undoubtedly exceeds the power, and would of course be void for the excess; although, as Mrs. *Eliot* has survived her sister, the question never can arise. The Vice-Chancellor, however, has gone a step further, and considering the appointment to trustees for Mrs. *Eliot*'s separate use during her coverture to be invalid, has directed the two thirds of the property in question to be settled to the same uses as were declared by her marriage settlement with respect to the remaining third; thus giving to the husband an absolute control over the rents and profits during his life, and entirely defeating the testator's object. This decision of his Honor is warranted neither by principle nor by authority; indeed it is directly at variance with both. The validity of such an appointment in the case of personal estate given for the benefit of a *feme covert* has been recognised in a great variety of cases; *Alexander v. Alexander* (a), *Maddison v. Andrew* (b), *Pitt v. Jackson* (c), *Crompe v. Barrow* (d); and it has been assumed in this very case, in that part of the decree which relates to the appointment of the long annuities. There is no principle upon which a different rule can be supported with respect to appointments of real estate. On the contrary, recent decisions shew most distinctly that in this respect real and personal estate stand precisely on the same footing; the purpose and the result being to secure to the object of the power, more fully than at law could be done, the entire and uncontrolled enjoyment of the property which was the subject of the appointment. If it

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(a) 2 Ves. sen. 640.

(c) 2 Bro. C. C. 51.

(b) 1 Ves. sen. 58

(d) 4 Ves. 681.

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it should be held that the appointment is bad at law, and that the estate has therefore vested in the husband, still, according to Lord *Kenyon's* observation in *Doe v. Martin (a)*, the husband would be considered in this Court as a trustee for the separate use of the wife, so as to secure to her all the benefits intended for her by the testator. The very point was in fact decided by *Kenworthy v. Bate (b)* which absolutely concludes the question; and the principle was assumed by Lord *Kenyon* in *Pitt v. Jackson*, and again by Sir *John Leach* in the recent case of *Trollope v. Linton. (c)*

The following cases were also cited in support of the appellant's argument; *Bennet v. Davis (d)*, *Roberts v. Dixwell (e)*, *Churchman v. Harvey (g)*, *Long v. Long (h)*, *Carver v. Bowles (i)*, *Major v. Lansley (k)*.

Mr. *Jacob* and Mr. *Norton*, in support of the decree.

The general words "in such manner and form" apply in strict grammatical construction only to the limitations over and to the gross sums chargeable for the benefit of the children, and not to any prior interest to be created in the property. The terms in which the power is expressed are less comprehensive than the terms to be found in many of the forms in modern use, and less comprehensive than those which occurred in *Pitt v. Jackson*. At law, the appointment is certainly bad, for it purports to give legal estates to trustees who are persons not within the scope of the power; and the question then remains whether it is good in equity; *Hervey v. Hervey (l)*. Now, it is plain from the

(a) 4 T. R. p. 64.

(b) 6 Ves. 793.

(c) 1 Sim. & Stu. 477.

(d) 2 P. Wms. 516.

(e) 1 Atk. 607.; 2 Eq. Ca. Ab.
 668. pl. 19.

(g) Amb. 535.

(h) 5 Ves. 445.

(i) 2 Russ. & Mylne, 301.

(k) Ibid. 355.

(l) 1 Atk. 561.

the whole frame of Serjeant *Heywood's* settlement, that the power contemplated, and was intended to authorise the creation of legal estates only. In this respect, there is an obvious distinction between an equitable and a legal power—a power to give beneficial interests to be enjoyed through the medium of trustees, and to be moulded and dealt with in a court of equity, and a power to appoint legal estates. This is a power of the latter kind; the appointor himself had a legal estate, and all the limitations in default of appointment are limitations of legal estates. In putting a construction upon the settlement, therefore, it is not to be presumed that the parties intended to authorise the creation of any estates except such as could be created at law. A separate use vested in a married woman is a species of interest of which a legal estate is not capable, and to which there is nothing analogous at common law. Any appointment to Mrs. *Eliot*, in order to be a due execution of the power, must have given her a legal estate, upon which, however it might be modified, her judgment debts as well as the marital rights would attach. No such estate, however, could have been given to that lady without defeating the settlor's declared object. This circumstance suggests one essential distinction between the numerous cases in which equity has interposed to support appointments made under powers defectively executed at law, and the case now before the Court, that whereas in the former there might, but for some slip or oversight, have been a valid execution at law, here the formal defect in the execution cannot possibly be supplied or corrected without defeating the very purpose of the appointment. No strictly legal execution of this power could have operated to give to Mrs. *Eliot* such an interest as her father's will affected to create for her exclusive benefit. The effect of supporting

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the trust for her separate use as a good equitable appointment would be to convert a power, created for one purpose, to a totally different and foreign purpose, and would destroy the title of judgment creditors, as well as the right of her husband to receive the rents and profits of the estate, and to be tenant by the curtesy in case he survived her. All the former cases have arisen upon questions between the appointee and the persons claiming as in default of appointment. The peculiarity in this case is, that *Mrs. Eliot* is in equity claiming against herself and other parties interested under a marriage settlement; and that, for the purpose of excluding herself and her children, she is attempting to cut down the estate which she takes under that settlement from an estate tail to a mere life interest. With the exception of *Pitt v. Jackson*, *Kenworthy v. Bate*, and *Trollope v. Linton*, the authorities cited on the other side are all cases of appointments of personalty, and have no application; for the separate interest of a married woman in personal estate is generally, and almost necessarily, the subject of a trust, and has been recognised and supported by courts of equity for upwards of a century, with a view to her protection against the otherwise absolute dominion of the husband. In *Pitt v. Jackson* the same counsel appeared on behalf of both husband and wife, so that the question never could have been distinctly raised. *Trollope v. Linton* is nothing more than a *dictum*, not necessary to the decision of the case; and as to *Kenworthy v. Bate*, on which so much stress has been laid, independently of the points already noticed, in which it is clearly distinguishable from the case under appeal, the appointment there was substantially a good execution of the power, inasmuch as it gave to the objects of the power, in the form of money, the whole property which was the subject of the power.

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Mr. *Stevens* and Mr. *Gresley* appeared for other parties.

The *Solicitor-General*, in reply.

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The appeal in this case is confined to that part of the decree which declares that an appointment in the will of the late Serjeant *Heywood* of two thirds of an estate in *Ireland*, to trustees, for the separate use of the appellant, Mrs. *Eliot*, was invalid, and that she was under the covenant in her settlement bound to settle the same to the uses contained in that settlement as to the other one third, and which directs her to convey the same accordingly, and directs payment to her husband of the rents of such two thirds: the appellant contending that the will of Serjeant *Heywood* ought to take effect so as to secure to her, for her separate use, the rents of the two thirds in question; and that she is entitled to the two thirds of the estate under the Serjeant's appointment by his will, and is not bound to settle it upon the trusts of her marriage settlement.

[His Lordship here stated the limitations contained in Serjeant *Heywood's* marriage settlement, and continued:—]

The power was to be exercised in favour of all or any of the children, for such estate and estates, charged with such annual or gross sums in favour of children, and in such manner and form as the Serjeant might appoint; and then follow limitations in default of appointment, under which, in the events which have happened, the estate has devolved upon Mrs. *Eliot* in tail. Of this

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marriage there were issue but three daughters who survived childhood and attained twenty-one; *Mary Isabella*, who died, before the Serjeant's will, unmarried; *Phæbe Augusta*, who also died unmarried, but after the Serjeant; and *Anne*, now Mrs. *Eliot*, who has children.

Preparatory to the marriage of Mrs. *Eliot*, Serjeant *Heywood* appointed one third of the estate in question to her in fee; and by her marriage settlement, dated the 5th of *January* 1815, this third was conveyed to trustees in fee, to the use (subject to the life estates of Serjeant *Heywood* and his wife) of Mr. *Eliot* for life, remainder to Mrs. *Eliot* for life, remainder to the use of the children of the marriage as therein provided. In this settlement there was the following covenant by Mr. *Eliot*. [His Lordship read the covenant.] The subject upon which this covenant is to operate is any other interest in the estate in question to which Mrs. *Eliot* might become entitled by survivorship or otherwise; but the covenant is not to operate, if the property be otherwise expressly directed or appointed by the deed or will by virtue of which she shall become entitled thereto.

Serjeant *Heywood*, by his will, dated the 15th of *June* 1826, executed and attested as was required by the power reserved in the settlement of 1780, (after reciting that one third of the estate had been limited by the settlement of the 5th of *January* 1815,) in pursuance of the power reserved in his own marriage settlement, and in execution thereof, directed and appointed as follows. [His Lordship here stated the material part of the will.]

It is admitted that the testator had no power to make the provision intended by his will for the children of Mrs. *Eliot*. Independently of such provision, what the
 testator

testator has attempted to do is to appoint the two thirds of the real estate to trustees, for an interest which was to continue during the life of his daughter *Phæbe Augusta*, and the joint lives of his daughter *Anne* and her husband, upon trust, to pay 300*l.* a year for *Phæbe*, and the residue of the rents, and after *Phæbe's* death the whole, for the separate use of *Anne*; and if *Anne* should survive her husband, then after his death and the death of *Phæbe*, he appointed the two thirds of the estate to *Anne* and the heirs of her body. The testator, then, in the event of *Anne* dying in the lifetime of her husband and of *Phæbe Augusta*, attempts to give to *Anne* a power of appointment to her children; and in default thereof, and as to so much whereof no complete appointment should be made, he appointed the same to the heirs of the body of his daughter *Anne*.

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It is to be observed that the estate tail given to *Anne* is contingent upon her surviving her husband; and the gift to the heirs of the body of *Anne* is contingent upon her dying before her husband and *Phæbe Augusta*, and not making an appointment in favour of her children.

[His Lordship then stated the substance of the decree.]

The effect of this decree is to declare that the testator had no power to direct the payment of the rents to his daughter *Anne* for her separate use, and to treat the appointment as creating a valid estate tail, inasmuch as it directs her to convey the two thirds to the trustees of her own settlement under the covenant, although the estate tail was given only in the event of *Anne* surviving her husband, who is still alive, and although the covenant in her settlement was by the husband only, and was to operate only in the event of the instrument under

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which she might become entitled to the property not directing otherwise. The effect of the decree is to give to the husband an estate for life in his own right, contrary to the express directions of Serjeant *Heywood's* will, and unless she should survive her husband, to deprive the wife of all benefit from the property; and if she should survive him, to give her only a life estate, although, in that event, the testator gave her an estate tail.

The first question to be considered is whether Serjeant *Heywood* was authorised by his own settlement to appoint the rents of the two thirds of the estate to the separate use of his daughter *Anne*; because, if he was, the question whether such interest as she took under his will was, or was not, subject to the covenant in her own settlement, will not arise. Now, his power is to appoint in favour of children for such estate and estates, charged with such annual or gross sums, and in such manner and form as he should think fit. As to so much of and such interest in the estate as Serjeant *Heywood* should not effectually appoint, Mrs. *Eliot*, in the events which have happened, would, by the provisions of the settlement of 1780, be entitled in tail. It is said that what Serjeant *Heywood* has attempted to do, by way of appointment, in the event of Mrs. *Eliot* dying in the lifetime of her husband and sister, namely, to give her a power of appointing amongst her children, and, in default of her so appointing, to give the estate to the heirs of her body, is not within the power, and therefore void. But he has also appointed the rents of the estate, during the joint lives of herself and her husband, to trustees for her separate use, and the estate itself to her in tail, if she should survive her husband; and the decree declares that his appointment to her in tail is valid; but that the appointment of the rents for her separate use is invalid; and the decree directs Mrs.

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Eliot so to deal with this estate tail as to settle it according to the covenant in her own settlement. Now it is to be observed, that if the appointment of the rents to her separate use, and of the estate, in the event of her dying in her husband's lifetime, be invalid, Mrs. *Eliot* is entitled to an immediate estate tail under the settlement of 1780; but the estate tail, under the appointment in the will of Serjeant *Heywood*, is made to depend upon her surviving her husband, who is still alive; and, therefore, it does not appear how such an estate can be made subject to the covenant in her settlement, even supposing the object of that settlement to be to give interests to the husband, and not to protect the wife against the exercise of his marital rights.

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It has not been disputed at the bar, and the decree affirms, that the appointment of the estate tail is good; but if it be good, it must prevail according to the terms and conditions of the appointment, namely, to take effect after the termination of the joint lives of Mr. and Mrs. *Eliot*, and in the event only of Mrs. *Eliot* surviving her husband.

Serjeant *Heywood*, in exercising this power, has given to his daughter the rents for her separate use, during the joint lives of herself and her husband, and, if she survive him, then the estate, in tail; the obvious object being to protect his daughter against the marital power of her husband, and to exclude the husband from any participation in the benefit of that property. The decree, however, wholly defeats this object in two ways. It declares the gift of the rents for the separate use of Mrs. *Eliot* to be invalid; and it treats the estate tail, under the appointment, which it declares to be good, as a present interest; and it gives to the husband the same benefits in the two thirds of the estate as he had

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under his own settlement in the one third. . The terms of the power are as large as they can well be : — “ for such estate and estates, and in such parts, shares, and proportions, and with such limitations over, and charged with such annual or gross sums, such limitations over and charges to be to or for the benefit of the same children, and in such manner and form,” as Serjeant *Heywood* should, at any time or times, direct, limit, or appoint. What is there to prevent the donee of such a power from directing the rents of the estate, the subject of the power, to be paid to a married daughter, during the joint lives of her and her husband, and, if she survive her husband, the estate itself to her in tail?

In support of the decree it was first contended that the words “ in such manner and form ” applied only to the charges to be created, and the limitations over to be made, under the power ; but this is clearly contrary to the meaning of the clause ; the copulatives run through the whole of it, and every limb of it is part of the whole body, — “ for such estates, *and* in such parts; *and* with such limitations, *and* charged with such sums, *and* in such manner and form.”

It was contended, secondly, that under such a power the donee could only appoint so as to create legal estates. Could he then, in executing the power to charge, create only a legal rent charge? and what do the words “ in such manner and form ” imply? The argument assumes that under such a power the donee could not, for any purpose, create a trust. It was said, indeed, that a court of equity would not interfere to carry such intention into effect. But the Court interposes only as it does to enforce the execution of all other trusts ; the appointment creating a legal estate in trustees during *Mrs. Eliot's* life ; and the argument was necessarily

necessarily confined to appointments of which the subject is a legal estate in land; this very decree giving effect to a precisely similar appointment over a sum of stock. The objection, therefore, is not that the appointment is not within the terms of the power, but that such a power, to be exercised over land, including the legal estate as well as the beneficial interest, must be confined to creating a legal estate and cannot create a trust. This must depend upon the terms of the power, and the intention by those terms expressed; for, undoubtedly, every mode of dealing with an estate may be effected through the means of a power which could be exercised by the original authors of the power.

1826.

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v.
Barnes

All this reasoning, however, must yield to the weight of authority, if the point has been established by authority. *Alexander v. Alexander* (a) was cited for the appellant; and that case establishes that, under a power to appoint a personal fund in such proportion as the donee should direct, an appointment to one of the objects for life, to her separate use, was good. So far it is a strong authority for the appellant; but the respondent contended that another part of that case was in his favour, that is to say, the part which related to the share of *Francis*. Now, as to *Francis's* share, the case was this:—the donee having power to appoint amongst children, gave, contingently, a part of the fund to two of the children, to apply it at their discretion for the benefit of another child, namely, *Francis*, his wife, and children. This was clearly bad on two grounds. It was a delegation of the power, and was to be exercised in favour of the wife and children, who were not objects of the power. The decision upon this point cannot possibly aid the argument of the respondent.

The

(a) 2 Ves. sen. 640.

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The respondent's counsel also attempted to draw an argument from *Hervey v. Hervey* (a), which, they contended, established the proposition, that a power to appoint in favour of a particular person cannot be executed by an appointment to trustees for such person. In that case there was in a settlement a power to a father to make a jointure to the amount of 600*l.*, interposed between his own legal estate for life and a legal remainder to his son; and he attempted to execute the power by appointing the estate to trustees, upon trust, to pay 600*l.* a year to his wife. Lord *Hardwicke* held that a power to jointure was a power to create a legal estate, and was not well executed by creating a trust; but he, nevertheless, considered the wife as entitled to her jointure, and decreed accordingly. That is no authority to shew that such a power as is found in this case cannot be executed by creating a trust; but it does prove, that where there was at law a failure in the execution of the power, this Court gave to the object of it, being a wife, the full benefit of it. The report of *Churchman v. Harvey* (b) establishes the same principle. No other cases were relied upon for the respondent. Several were cited for the Appellant, in which, under such a power of appointment as in the present case, over a fund of personalty, an appointment for the separate use of a married daughter had been held good. To that class belong cases like *Alexander v. Alexander* and *Madison v. Andrew* (c), upon which it is not, however, necessary to observe particularly; the decree in this very case establishing the proposition as to the one third of the Long annuities.

It was contended, however, that the rule does not apply to lands, at least when the subject of the power is

(a) 1 *Atk.* 561.

(c) 1 *Ves.* sen. 58.

(b) *Amb.* 535.

is a legal estate in lands. No case, as I have already stated, was cited in support of this proposition. Against it there are several. The first of these is *Pitt v. Jackson* (a), where a sum of money was covenanted to be laid out in land, to be settled upon the husband for life, remainder to the wife for life, remainder to the children in such shares, for such estates, and subject to such powers, limitations, and provisos as the husband should appoint. Real estates were purchased with the trust fund: but the husband, by his will, directed that 10,000*l.*, which he considered to be part of the trust fund, should be laid out in land, to be conveyed to a daughter of the marriage for life, for her separate use, with remainder to her children in tail. The cause was first heard by Lord *Kenyon*, then Master of the Rolls, sitting for the Lord Chancellor, when it was decreed that as to this sum of 10,000*l.*, it should be laid out in land, to be settled to the use of trustees for the daughter and the heirs of her body; but that the profits should be paid for her separate use. The cause was afterwards reheard by Lord *Rosslyn* upon a bill of review, under the name of *Smith v. Lord Camelford* (b), when his Lordship decided that the appointment did not operate upon the land purchased, the husband having intended to appoint the fund; nor upon the fund, because it had ceased to exist, being invested in the land. The judgment of the Master of the Rolls, however, with respect to the effect of the appointment of the 10,000*l.*, if there had been a proper subject-matter upon which the appointment could operate, is not affected by the decision of Lord *Rosslyn*. On the contrary, Lord *Rosslyn* (c) expresses an opinion in favour of Lord *Kenyon*'s judgment upon this point.

The

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(a) 2 *Bro. C. C.* 51.
 (b) 2 *Ves. jun.* 698.

(c) 2 *Ves. jun.* pp. 711, 712.

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THORNTON
v.
BENNET.

The case of *Pitt v. Jackson* is admitted to be an authority for the appellant; but its weight is attempted to be lessened by a statement, that the same counsel appeared for the husband and the wife. In *Crompe v. Barrow* (a), the subject of the power was leasehold property in trust. It is, however, an authority, that an appointment to the separate use of a married woman is a good appointment under a less extensive power than this. In *Kenworthy v. Bate* (b), the power was over a legal estate in land; the settlement being to the use of the husband for life, remainder to the wife for life, remainder to such children of the marriage as their father should by will direct and appoint. The father, by his will, directed that the estate should be sold and the proceeds divided among the children; and this appointment was supported, upon the authority of *Long v. Long* (c), *Thwaytes v. Dye* (d), and *Roberts v. Dixall*. (e) How then can it be contended, that such a power as this over a legal estate in lands can only be executed by creating legal estates? If the contrary be the law, where then is the difference between such appointments over personalty and over land; and what is the ground of the difference which this decree establishes? The cases of *Bennet v. Davis* (g) and *Doe v. Martin* (h) were cited for the appellant, to prove, that if there were any objection in the appointment to trustees, the wife's right would be the same in equity; but in my view of the case, it is not necessary to resort to that ground.

It was lastly contended for the Respondent, that supposing the appointment for the separate use of Mrs. *Eliot* to be good, she was bound by the covenant to de-
vest

(a) 4 Ves. 681.

(b) 6 Ves. 793.

(c) 5 Ves. 445.

(d) 2 Vern. 80.

(e) 2 Eq. Ca. Ab. 668. pl. 19;
and 1 Atk. 807.

(g) 2 P. Wms. 316.

(h) 4 T. R. 64.

vest herself of it, and to settle the estate according to the terms of her own settlement, which would have the effect of giving to her husband an estate for life, and so defeat the object of the appointment. To this argument, however, there are three answers:—1st, That the covenant is the husband's only, and applies only to that over which he might have dominion; 2dly, That it does not apply to property, as to which any express order or direction was given inconsistent with the purposes of the settlement; and, 3dly, That the decree in this cause concludes this argument, because the one third of the Long annuities would be as much within the terms of the covenant as the two thirds of the real estate.

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 to
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Upon the whole, therefore, after paying every attention to the argument in favour of the decree, and with the utmost respect for the authority from whence it proceeded, I cannot come to the opinion, that this appointment for the separate use of Mrs. *Eliot* is void.

The result is, that I must reverse so much of the decree as declares the appointment to be invalid, and directs the conveyance to the uses of Mrs. *Eliot's* settlement, and as directs payment of the rents according to the declaration; and in lieu of that part of the decree, I must declare this appointment to be good, and direct the trustees to pay the rents to the separate use of Mrs. *Eliot* during the joint lives of herself and her husband.

There being no conveyance at present to be executed, it does not seem proper to make any further declaration as to the ulterior interests in the property.

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The personal assets, situate in *India*, of a testator who resides, and makes his will, and dies, in *India*, are not subject to legacy duty, although such assets are afterwards remitted to this country, by an executor who has proved the will in *India*, to executors who have proved the will in *England*, and are administered under a decree of the Court of Chancery here.

A man possessed of personal estate,

situate partly in *England*, but principally in the *East Indies*, where he was employed in the service of the *East India Company*, made his will in the *East Indies*, and died there. After specifically bequeathing his property in *England* to his wife, his will gave considerable pecuniary legacies to his infant children and to various other persons, some of whom were native inhabitants of *India*. One of the executors lived in *Calcutta*, and proved the will there, and having collected the *Indian* assets, and thereout paid the testator's *Indian* debts and funeral expenses, he remitted the surplus to *England* to the other executors, by whom probate of the will, in respect of the property in *England*, had been already obtained in this country. In a suit instituted in this Court by the testator's children against the executors, for the administration of the estate, the fund so remitted was transferred into Court, and having proved insufficient to pay the pecuniary legacies in full, it was ultimately ordered to be apportioned among the different legatees, in proportion to their respective legacies: Held, that the legacy duty was not payable in respect of any of the sums so appropriated to the respective legatees.

GEORGE ARNOLD, a lieutenant colonel in the *East India Company's* service, being possessed of a large personal estate, situate partly in *England*, but principally in the *East Indies*, where he and his family then resided, made his will, dated the 18th of *September* 1828, and thereby bequeathed legacies to a large amount to the persons therein named. Among others, he gave to his wife 1000*l.* sterling, and also his wines and property in *England*; to his daughter, *Sophia Mary Arnold*, 15,000*l.* sterling; to any child with which his wife might be pregnant at his death, 15,000*l.* sterling; to *Louisa Harriet Adam* 100,000*l.*, sicca rupees, to be vested in the *Company's*, or *British* funds, or other equally good securities, as soon after his decease as convenient; to *Setterah Khanum*, a native woman, the mother of *Louisa Harriet Adam*, the interest of 10,000 sicca rupees during her life, to be vested in the *Company's* funds when favourable opportunities might occur, and, at her death, the principal to revert to his residuary legatees. The testator appointed *James Robert-*
son

son *Arnold*, *Pownall Phipps*, *Leonard Streete Coxe*, *William Patrick Shedd*, and *George St. Patrick Lawrence*, his executors.

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The testator died at *Allahabad*, in the *East Indies*, on the 1st of *October* 1828, and left his widow and one child, *Sophia Mary Arnold*, an infant, surviving him. Within a month after his death, his widow was delivered of a son named *George Arnold*. Shortly afterwards, Mrs. *Arnold*, with her infant children, left *India* and came to *England*, where they arrived in the month of *May* 1829. On the 30th of *April* in the same year, *George St. Patrick Lawrence*, who resided at *Calcutta*, proved the will in the proper ecclesiastical court there; and collected and got in all the testator's property in the *East Indies*, and thereout paid his *Indian* debts and his funeral expenses.

In the month of *December* 1829, three of the other executors proved the will in the Prerogative Court of *Canterbury*, in respect of the testator's personal estate in *England*, and paid debts of the testator in *England* to a trifling amount; and a suit was instituted in this Court, in the name of the infant children, against the executors, for the purpose of having the property administered according to the directions of the will.

The Master by his report, in pursuance of the decree made in that suit, found that the testator's personal estate in *England*, at the time of his death, consisted of several sums of money and stock, and of certain debts due to him, and also of some wine and wearing apparel; and he further found that the testator was possessed of a large personal estate in *India* which was remitted to *England* between the months of *November* 1831 and *January* 1834 by *George St. Patrick Lawrence*, the executor in *India*,

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to the executors in *England*, and invested by the latter in the purchase of 3 per cent. consolidated Bank annuities, which were subsequently transferred into the name of the Accountant-General, in trust in the cause.

In consequence of the judgment of the Master of the Rolls, by whom it was decided that under the terms of the will, the testator's widow was entitled to the whole of his property situate in *England* at the time of his death (a), all the remaining legacies were to be provided for exclusively out of the proceeds of that personal estate, which had been collected in *India*, and had been remitted by Mr. *Lawrence* from that country to the executors at home. This fund, however, amounting to 56,659*l.* 8*s.* 9*d.*, proved insufficient to pay those legacies in full; and in pursuance of an order of the Court, it was subsequently apportioned by the Master among the legatees, in proportion to their respective legacies.

A claim having been made by the commissioners of stamps and taxes for the payment of the legacy duty in respect of the legacies payable out of this fund, a petition was now presented by the executors, praying a declaration that the fund in question was not subject to legacy duty.


Mr. *Wigram* and Mr. *Bethell*, for the petition.

It is now settled that upon the death of a testator having an *English* domicile, the legacy duty attaches upon all the personal assets out of which his legacies are payable, whether such assets be at home or abroad; *In re Ewin* (b). And upon principle it follows that the converse

(a) *Arnold v. Arnold*, 2 *Mylne & Keen*, 365.

(b) 1 *Crom. & Jero.* 151.

converse of the proposition must equally hold, viz., that where a testator dies domiciled in a foreign country, the whole of such assets are exempt from legacy duty. The two propositions are co-relative, and are both founded on the principle, that, as in law moveable property follows the person of the owner, its incidents must be regulated, except where otherwise expressly provided, by the laws which determine the rights and liabilities of that owner. In the case of probate duty, as to which the *situs* of the property determines the liability, a different rule prevails; *Attorney-General v. Dimond* (a), *Attorney-General v. Hope* (b); and for a very obvious reason; for the tax being imposed as a charge upon the authority which is given by the Ecclesiastical Court to the personal representative with a view to perfect his title to administer the estate, it is of necessity confined to such property as he is enabled to recover by virtue of that authority; in other words, to property which is to be got in or received within the limits of that Court's jurisdiction. The title to such property as is situate in foreign countries, if acknowledged at all, is acknowledged *ex comitate* only, and is of course liable to be controlled and modified, as each state may think proper, with reference to its own institutions and policy, and the rights of its own subjects. Therefore it is that, although in point of fact the right of the foreign executor is usually admitted, he is required to take out a new probate in the country where he seeks to recover the assets; such probate, however, being merely auxiliary to the original probate, so far as regards the collection and distribution of the effects; *Story's Commentaries*. (c) The liability to legacy duty depends upon considerations wholly different, and is determined

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(a) 1 *Crom. & Jerv.* 366.

(c) *On the Conflict of Laws*,

(b) 8 *Bligh*, 44. *N. S.*; and 421—423.

1 *Crom. Mee. & R.* 530.

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determined not by the *situs* of the property, the place where the legatees reside, or the country or court in which the property is administered, but simply and solely by the domicile of the party from whom it comes.

The second section of the 36 G. 3. c. 52., the act upon which the question entirely turns, however general and comprehensive in its terms, could not be intended to apply to a person domiciled, as this testator was, in the *East Indies*, any more than to a person who lives and dies the subject of a foreign state. It is perfectly settled, besides, that our colonies and dependencies abroad, unless specially named, are never bound or affected by the laws which are, from time to time, made by the parliament at home; least of all by fiscal enactments, which are always to be construed strictly, and must, where there is no express provision to the contrary, be confined in their application to persons who are resident and domiciled within the ordinary jurisdiction of the domestic legislature. Whether *England* has the power of levying a direct tax upon the inhabitants of *India* may possibly be questioned. At any rate she has not affected to exert such a power in this instance; and as the right to raise a revenue, by taxation, is now exercised by the local government, the estate of this very testator may, for aught that appears, be subject to a legacy duty imposed by the fiscal laws of the *East Indies*. The consequence would be, that the same property would be chargeable with two duties, one payable to the *Indian*, and the other to the *English* exchequer. An analogous case might arise with respect to a testator dying domiciled in *Ireland* (where the scale of duties is different), but leaving personal estate both there and in this country. If the executors of such a testator take out an auxiliary probate in *England* with a view to the complete administration of the estate, are the legatees to be subject to

to the *English* rate of duty, because the estate is partly administered here? or to the *Irish* rate, because the testator was domiciled in *Ireland*? or to both? Upon every principle of justice and common sense it is plain that the domicile must determine that question. The revenue law made for *Ireland* must, in the absence of a special provision to the contrary, regulate the liabilities of the *Irish* people in their persons and in their property. Mr. Baron *Bayley*, in the case of *Ewin* (a), expressly lays it down, that the Legacy Acts are co-extensive with this kingdom, and do not extend to the territorial possessions of the Crown in *India*. That a person may lose his original domicile and acquire a new domicile by a residence in the *East Indies*, was settled by the judgment of the House of Lords, affirming the decision of the Court of Session, in *Bruce v. Bruce* (b); and the same principle is recognised in *Munroe v. Douglas* (c). That the testator, in the present case, must be considered as a person who had an *Indian* domicile, is sufficiently established by the fact that, at the date of his will, as well as at the time of his decease, he was residing with his family in the *East Indies*, where he had long been employed in the military service of the Company.

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It will probably be conceded that, in ordinary cases, the doctrine of Mr. Baron *Bayley* is correct; but an attempt will be made to distinguish this case, on the ground that some of the legatees are resident in *England*, that three of the executors have proved the will here, and especially that the property, upon which the duty is sought to be attached, is administered in this country, and through the medium of this Court. None of these circumstances

(a) 1 *Crom. & Jerv.* 151.

(c) 5 *Mad.* 379.

(b) 2 *Bos. & Pull.* 229. n.

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circumstances, however, either singly or collectively, can be allowed to create any substantial difference in this respect. The *situs* of the legatees, like the *situs* of the property, is obviously a matter of mere accident, and unless it is to be ascertained at the moment of the testator's death, may be repeatedly changed in the interval which elapses between that event and the payment of the legacies. In *Bruce's* case (a) the legatees were held exempt from payment of the duty, although they all resided in this country. The circumstance that some of the executors have proved the will at home is equally immaterial; for the *English* probate was taken out with reference, and was limited to the assets locally situate in *England*, which were of very trifling amount, and the whole of which have been already administered by virtue of that probate. The property which is now the subject of the claim was possessed and remitted to this country under the authority of the *Indian* probate, and any subsequent probate taken out here with reference to that property, must be considered to be merely subordinate and ancillary to the *Indian* probate; it may be a form required by the practice of the Court of Chancery, but it is not essential to the due administration of the estate. Whether any such probate, however, has or has not been obtained in this case, is quite unimportant; the duty being imposed, not on the estate collected by virtue of the probate, but on the legacies payable out of the assets of persons who come within the meaning of the act. If that be so, can the circumstance that the assets are now in this country, and are to be administered here through the medium of the Court of Chancery, constitute any real distinction? No such distinction is warranted by the language of the statute; the plain import and effect of which is, that when the person

(a) *In re Bruce*, 2 *Crom. & Jerv.* 436.

person upon whose property the duty was meant to attach has been once got at, the legatee, whether *English* or foreign, and whether receiving his legacy in this country or abroad, shall equally be chargeable with the duty. If, then, this testator was not, at the time of his death, such a person as came within the meaning and contemplation of the act, it would be absurd to suppose that any subsequent proceeding on the part of his personal representative can ever bring him within its operation. It is evident that when a testator dies in *India*, whether his legatees be in that country or not, it is not a matter of necessity that his property should be made liable to legacy duty, and that if such liability is to be incurred at all, it can only be through the spontaneous act, or the caprice, of his executors. The question, who is or is not a person contemplated by the statute, cannot be left to be determined by accidental circumstances over which the party himself has no control. The right of the Crown must be fixed and ascertained at the moment when the testator dies; it attaches according to a general and uniform principle, and cannot be affected by subsequent accidents, or by the contingent and capricious acts of other parties.

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The cases of *The Attorney-General v. Cockerell* (a) and *The Attorney-General v. Beatson* (b) may seem at variance with this doctrine; but they are distinguishable from the present case; and at all events they are inconsistent with the principles laid down in the later cases, particularly *In re Erwin*, *In re Bruce*, and *Logan v. Fairlie* (c); and they were expressly over-ruled by the Court of Exchequer in *Jackson v. Forbes* (d), a decision which was subsequently affirmed in the House of Lords, under

(a) 1 Price, 165.

(c) *Ante*, vol. i. p. 59.

(b) 7 Price, 560.

(d) 2 Crom. & Jerv. 382.

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under the name of *The Attorney-General v. Jackson*. (a) That case is on all fours with the case now before the Court, and would absolutely conclude the present question, even if the doctrine contended for were not, as it is, supported by principle, and by every sound rule of construction.

Mr. Sharpe, for *Setterah Khanum*, and *Louisa Harriet Adam*, two of the legatees, submitted that, as his clients were natives of *India*, still residing in that country, and as the amount of their legacies was directed by the testator to be invested in Company's paper, those circumstances furnished an additional argument in favour of exempting them from the payment of the duty.

The Solicitor-General and Mr. John Romilly, for the Crown.

The proposition that the domicile of the party from whom the property comes determines whether the legacy duty shall be payable or not, is entirely new, and not only unsupported by authority, but directly opposed to it. There is no foundation in law for holding, what has been assumed throughout the argument on the other side, that a native *Englishman* may have a domicile in the *East Indies* distinct from and adverse to a domicile in *England*. (b) The opinion intimated by Baron Richards upon this point in *The Attorney-General v. Cockerell* (c), is otherwise. The judgment of the Court of Session in *Bruce v. Bruce*, which was afterwards affirmed in the House of Lords (d), and to which Baron Richards probably

(a) 8 *Bligh*, 15. N. S.

(b) It did not appear on the pleadings, or in any of the proceedings in the cause, but it was assumed throughout the argu-

ment on both sides as a fact, that the testator was a natural born *Englishman*.

(c) 1 *Price*, 165.

(d) 2 *Bos. & Pull*, 229. n.

bably alludes, merely decided, that if a *Scotchman* leaves his native country and settles in *India*, he thereby acquires an *English* domicile, and that in the event of his dying intestate, his property becomes distributable according to the law of *England*; but it is far from proving that a person may be domiciled in one of the colonies as against the mother-country—the proposition which was contended for here.

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The question does not depend solely upon the wording of the 36 G. 3. c. 52. That statute must be construed with a special regard to the language and provisions of the prior statutes, the 20 G. 3. c. 28., the 23 G. 3. c. 58., and the 29 G. 3. c. 51., for which it was substituted. Upon a reference to those earlier statutes, it will be found that the duty was thereby imposed on the receipt given to the executor by the legatee. So long as those statutes were in force, and down to the time when the 36 G. 3. c. 52. came into operation, it is clear that the duty was payable by the person signing the receipt, and that the place of the testator's or of the legatee's domicile was utterly immaterial; all persons, whether foreigners or natives, and whether domiciled in this country or abroad, being chargeable with the duty. What alteration, then, was introduced by the 36 G. 3. c. 52.? That statute, which was passed by way of substitution for the former acts, imposed a higher rate of duty; but it made no change in the persons who were to bear the charge, and certainly, instead of being less stringent, it was intended to be more stringent upon legatees. In fact, it had been found that the duty which, under the old law, was only charged on the receipts, was liable to frequent and easy evasion; and, therefore, it was provided that in future the duty should be a charge on the *corpus* of the fund receivable by the legatee. That this alteration was not intended

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tended to relieve the assets of testators who died domiciled abroad from payment of the duty, is conclusively proved by the language of a subsequent statute, the 44 G. 3. c. 98. That statute enacted that if the persons, who under the acts prior to 1797, were liable to certain legacy duties, (and such persons, it has been shewn, might be legatees claiming under the wills of persons who had a foreign domicile,) did not within two years pay those duties, the 36 G. 3. c. 52. should operate retrospectively, and the higher rate of duties be applicable to them. And yet, according to the argument on the other side, such legatees, after the expiration of the two years, were, by the terms of the 36 G. 3. c. 52., to become exempt from the payment of all legacy duty whatsoever.

The proposition now contended for would introduce an anomalous and entirely new principle in the administration of our revenue law; for hitherto our courts of justice, in determining the limits of its operation, have uniformly looked to the place where the act is done with reference to which the tax or duty is imposed, and not to the domicile of the party whose property is to be affected by the impost; *Ximenes v. Jaques* (a), *Winbled v. Malmberg* (b).

Agreeably to the old and well established rule, the liability to legacy duty depends simply upon the fact, whether the legacy is or is not paid out of assets administered in this country. That rule was solemnly laid down and acted upon in *The Attorney-General v. Cockerell* (c), and it was again recognised in *The Attorney-General v. Beatson*. (d) Every circumstance which the
Court

(a) 1 *Esp.* 311.(b) *Ibid.* 454.(c) 1 *Price*, 165.(d) 7 *Price*, 580.

Court of Exchequer considered material in *The Attorney-General v. Cockerell*, is to be found *in terminis* in this case. The testator died resident in *India*: his will was proved, and his assets were collected there: the will was subsequently proved by another executor at home: that other executor possessed the assets which were remitted to him from *India*, and applied them in a course of administration; and there, as here, personal estate was administered by a personal representative in this country. The case of *The Attorney-General v. Beatson* is not to be distinguished in any material circumstance from *The Attorney-General v. Cockerell*. In one point it was stronger and more directly applicable to the case now before the Court; for it was there distinctly found as a fact that the testator, who was a native of *Scotland*, was a person domiciled at *Madras*; and that circumstance was held to make no difference. The decision of Sir *J. Leach* in *Logan v. Fairlie* (a), in which his Honor held, that the duty attached, inasmuch as the property was administered in this country, proves the concurrence of that eminent Judge in the doctrine of the Court of Exchequer; and the recent reversal of that decision by the Lords Commissioners (b), proceeding, as it did, solely on the ground that Sir *J. Leach* was mistaken in the fact which he assumed as the basis of his judgment, does not, in this respect, at all weaken the authority of the case. The same rule was again impliedly recognised by Lord *Gifford* in *Hay v. Fairlie*. (c) The case of *In re Ewin* merely determined, that where the property of an *Englishman*, who makes his will and dies in *England*, is administered here, the legacy duty is payable upon that property, although it may consist wholly or in part

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(a) 2 Sim. & Stu. 284.

(c) 1 Russ. 117.

(b) *Ante*, vol. i. p. 59.

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part of money invested in foreign securities. The cases of *The Attorney-General v. Dimond* and *The Attorney-General v. Hope* have no application; for they refer only to probate duty, which is governed by a different rule; it not being imposed by the act upon assets which, from being situate in a foreign country, the personal representative may effectually reduce into possession independently of any title conferred by the decree of an *English* court. So in the case of legacy duty, it is not contended on behalf of the Crown, that the duty attaches upon all the property of every person who happens to die in a foreign colony, but only upon such property as comes to be administered here, either by the hands of the personal representative, or through the medium of this Court.

In *Bruce's* case (a), the testator was the subject of a foreign state, and was not, like this testator, a natural born subject of the King; and Mr. Baron *Bayley*, in his judgment, expressly relies upon that circumstance as essentially distinguishing the case from *The Attorney-General v. Cockerell*, *The Attorney-General v. Beatson*, and *Logan v. Fairlie*, in all of which, as here, the property was the property of *British* subjects, and the testators, being resident in *India*, and originally *British* born, were liable to be bound by all statutes made by the *British* parliament, and sufficiently comprehensive to include them. The case of *The Attorney-General v. Jackson*, so much relied on by the other side, proceeded upon the assumption, that the whole funds had been administered by the executors in *India*, and all the debts and legacies paid, and that the executors coming with the fund to this country, were trustees for the residuary legatees. No probate was taken out in this country,

(a) *In re Bruce*, 2 *Crom. & Jerv.* 436.

country, and there was no personal representative here, — circumstances which entirely distinguish it from the present case. To hold that the liability to the duty shall depend upon the domicile of the party at the moment of his death, would lead to endless and most embarrassing inquiries, which it must have been the object of the legislature to avoid. The duty, therefore, is made payable in any circumstances under which it is possible to enforce the payment; and this can be easily and effectually done whenever the property is administered in this country.

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Mr. *Wigram*, in reply.

The LORD CHANCELLOR [after stating the principal facts of the case : —]

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The decree on further directions having declared, with reference to the construction of the will, that the widow was specifically entitled to the property situate in *England*, and the will having also bequeathed large sums of money to the testator's children and to other persons, it followed as a necessary consequence, that the assets which the executor in *India* had remitted from that country to the executors at home, formed the only fund applicable to the payment of the pecuniary legacies. And the question now is, whether, under the circumstances I have stated (for the particular provisions of the will do not appear to me at all to affect the question) the legacy duty is, or is not to be charged in respect of those legacies.

This question in the first instance, independently of the cases which have been decided, will turn upon the terms

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terms of the 36 G. 3. c. 52.; for the subsequent act of parliament, the 48 G. 3. c. 149. does not appear to me to be material. The second section of the 36 G. 3. c. 52. imposes a legacy duty "on every legacy given by any will of any person." It is impossible that words more general than these can be used. The seventh section declares "that any gift by any will of any person, which shall, by virtue of such will, have effect, or be satisfied out of the personal estate of such person, shall be deemed a legacy within the meaning" of that act. This also is in terms as general as possible.

The fact relied upon, as subjecting the legacies to the duty, is, that the property was remitted from *India* to *England*, and administered by the executors in this country. This was an unnecessary proceeding. It may be said, indeed, to be by mere accident that such a course was adopted; for it is obvious that the executor in *India* having paid all the debts in *India*, and the executors in *England* having paid all the debts in this country, the former might, according to all the authorities, have avoided the question, by remitting the legacies direct to each legatee, or, instead of allowing them to pass through the hands of the personal representatives in this country, might have remitted them to an agent of his own, with directions to pay over the money to the persons entitled.

When the act speaks of "any will of any person," and of the legacies being payable out of the personal estate, it must, I think, be considered as speaking of persons and wills and personal estates in this country; that being the limit of the sphere of the enactment. It is clearly not applicable to the *East Indies*: it is applicable to this country. If there had been no property in this country, it would not have been necessary to
 prove

prove the will here, *quoad* the property in *India*. There was not a testator, or a will, or property in this country; and it is clear that of such property the Ecclesiastical Court would not have cognisance; its authority being confined to property within the limits of its own jurisdiction. Upon that ground it was held in *The Attorney-General v. Dimond*(a), that probate duty would not be payable upon property so situated.

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That a court of equity requires probate of the will, or letters of administration of the estate, of a deceased person, before it can adjudicate upon and distribute his property in this country, is a rule of convenience and security, and cannot affect this question; and it is not obvious how the liability to the duty can depend upon the circumstance whether the executor in *India* sends the legacy direct to the legatee, or sends it to the executor in *England*, who pays it to the legatee, either by his own hands or under the directions of a court of equity. Independently, therefore, of the authorities, I should, upon the construction of the act, have been of opinion that these were not legacies given by the will of a person intended by the act.

It is, however, necessary to consider how far the question is concluded by authority. If *The Attorney-General v. Cockerell* (b) and *The Attorney-General v. Beatson* (c) still afford the rule, the duty is clearly payable. In *Logan v. Fairlie* (d) Sir John Leach held the duty payable, because the agent of the executor in *India* had authority to pay the legacy to the legatee first entitled, but had no authority, as he supposed, to pay it to those
who

(a) 1 *Crom. & Jerv.* 356.; see
also *Attorney-General v. Hope*,
8 *Bligh*, 44. *N. S.*

(b) 1 *Price*, 165.
(c) 7 *Price*, 560.
(d) 2 *Sim. & Stu.* 285.

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who were to take in the event of the first legatee being dead. When that case came before Mr. Justice *Bosanquet* and myself (a), *The Attorney-General v. Jackson* had been decided in the House of Lords; but, independently of that case, we were of opinion that Sir *John Leach's* decision could not be supported upon his own principle; because we thought that there had been an appropriation in *India*, and a remittance for the purpose of paying the legacy, in a certain event, to the children of the first legatee. That decision, therefore, proceeding, as it did, upon the misapprehension of a fact, namely, the extent of the authority with which the agent in this country was invested, and not upon the construction of the act of parliament, has no application to the present question.

In the case of *Jackson v. Forbes* (b) the testator died in *India*; his property was situate there; his executors proved the will there, and remitted the property in question to this country, and invested it in government stock; and two of the executors afterwards came to this country, and applied the fund, so remitted, according to the directions of the will, for the benefit of the residuary legatees. A bill having been filed in Chancery by one of those residuary legatees, the fund was transferred into the name of the Accountant-General in trust in the cause. The executors did not prove the will in this country, although the bill, by mistake, alleged that they had done so, — a fact which does not appear to have been noticed in the course of the argument. The question upon the liability to legacy duty came, in the first instance, before this Court, by which it was sent, in the shape of a case, to the Court of Exchequer; and that court

(a) *Antè*, vol. i. p. 59.(b) 2 *Crom. & Jerv.* 528.

court certified that, under these circumstances, the legacy duty was not payable. The certificate, having been acted upon by Lord *Brougham*, was made the subject of an appeal to the House of Lords, under the name of the *Attorney-General v. Jackson (a)*; where the decision of this Court, and of the Court of Exchequer, was ultimately affirmed.

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The Attorney-General v. Jackson, therefore, is a decision of the very highest authority. The facts were, in every respect, the same as they are here; with this single exception, that there was no representation in this country; the executors, when they came to *England*, not having taken out probate here, although, throughout the proceedings, the contrary was assumed to be the fact, and although there was just the same necessity, and no more, for such probate, as there is in the present case. It is quite impossible, however, to suppose that the liability of legatees to the duty can depend upon the act of the executor in proving or not proving the will in this country; the question being, not whether there be probate or letters of administration in *England*, but whether, within the meaning of the act of parliament, the property, out of which the legacies are payable, be property of a person which passes by the will of that person within the meaning of the act.

It is extremely fortunate that this question, which has been so long afloat, is now finally settled by an authoritative decision of the House of Lords. In the propriety of that decision I entirely concur; being satisfied that it does justice between the public and those whose property may become subject to legacy duty; but, even if I
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(a) 8 *Bligh*, 15. *N. S.*

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had not approved of it, I should have no power, sitting here, to alter it or depart from it.

I am, therefore, of opinion, on the authority of *The Attorney-General v. Jackson*, that the legacy duty is not payable upon the legacies in question.

REPORTS

OF

CASES

ARGUED AND DETERMINED

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IN THE

HIGH COURT OF CHANCERY.

In the Matter of the NORWICH Charities.

1837.
March 18.

THIS case came before the Lord Chancellor upon a petition to confirm the Master's report of his having appointed certain trustees of the *Norwich* charities, under the act for the regulation of municipal corporations, When a reference has been made to the Master to appoint trustees of a charity, it is the rule of the

Court to adopt the Master's appointments, unless the persons appointed can be shewn to be objectionable; and the Court will not enter into the question of the fitness of other persons whom the Master has refused to appoint.

Where, however, under the Municipal Corporations Regulation Act, a reference had been made to the Master, to appoint new trustees of charity property, in the stead of the old corporation, who had been the former trustees, and the Master had received evidence which tended to shew that there was a suspicion of the old trustees having exercised their trust for political purposes, and had declined to re-appoint any of the old trustees, and had written a memorandum, stating that he had come to that determination "in consequence of the case made against the old trustees;" the Court entered into the consideration of the propriety of the Master's conduct in rejecting all the old trustees; and held, that the existence of a general suspicion of impropriety on the part of the old trustees in the exercise of their trust, whether that suspicion were well or ill founded, justified the Master in declining to re-appoint any of the old trustees.

An institution for the maintenance and education of poor children, founded in 1617, and chartered in 4 Car. 1. (1628), was held, under the circumstances, to be not exclusively a Church of *England* charity, so as to make it proper to place it under the superintendence of a body of trustees consisting entirely of members of the Church of *England*.

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corporations (a), and upon a cross-petition, presented by *Samuel Bignold* and *William Rackham*, which prayed that the report might not be confirmed.

By an order made by the Lord Chancellor, on the 20th of *August* 1836, it was referred to the Master to appoint proper persons to be trustees of the charity estates and property, then late vested in or under the administration of the corporation of *Norwich*, or any of the members thereof in that character, which were affected by the seventy-first section of the act; with liberty to the Master to state special circumstances.

Among the charities of which it was necessary to appoint new trustees, were the *Great Hospital*, *Doughty's Hospital*, the *Boys' Hospital*, and the *Girls' Hospital*.

The petitioners, who now prayed the confirmation of the Master's report, carried in before the Master a list of names of persons to be appointed trustees; and the petitioners in the cross-petition also carried in a like list on their part. In the latter list were inserted the names of certain persons who had been trustees of the charities, in their capacity of members of the old corporation, including the cross petitioners themselves.

Upon the prosecution of the order of reference, there was produced before the Master a printed copy of a report with respect to the city of *Norwich*, made in the year 1835, by the Commissioners appointed, by His Majesty's commission, to inquire into the state of municipal corporations in *England* and *Wales*. This report stated, that the voters at the local elections at *Norwich* had

(a) 5 & 6 W. 4. c. 76.

had long been divided into two parties; the one called the purple and orange party, and the other the blue and white party; and that it had been clearly proved that bribery had been very frequently and extensively practised by both parties at the local elections. The report then particularised various instances of bribery; and it also stated, that a mode of bribing which had been frequently practised, consisted in giving notes, promising to get freemen into the hospitals, and to make them allowances until they could be admitted; that at the election of a sheriff in the year 1832, a note was given by an alderman to a freeman, promising to pay him four shillings a week till his brother's boy was put into the hospital school; that it was admitted on both sides that such notes had been frequently given, and that freemen had been placed in the hospital in consequence; that in some instances they had been given by the aldermen themselves, and in others the aldermen had been acquainted with the transaction; that loans of charity money, under the control of the assembly of the corporation, and which was called city money, had been frequently granted to particular individuals on account of their votes; that there was also evidence that in one instance of a parliamentary election, a loan of city money had been offered to a voter by an alderman, who at the same time promised to become one of the sureties, if the voter would vote for a particular candidate.

The Commissioners stated that the committee of the corporation for the management of the hospitals had employed no Whig tradesmen since the Tories gained the ascendancy. The report added, that one of the aldermen, who was, at the time of the inquiry, treasurer, and also a member of the committee, of the *Great Hospital*, admitted that the acceptance of tenders was influenced by

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the politics of the parties who made them; that it had been clearly established by evidence, that a preference was given, in the employment of tradesmen, by the different committees, to those whose political sentiments were in unison with their own; that although there was a regulation forbidding members from being employed as tradesmen by the committees to which they belonged, yet that that rule had been violated on several occasions. The report added, that the mayor stated it that would be impossible, in the city of *Norwich*, to exercise patronage on any other principle than that of political partizanship; that he said, that of the twenty-four aldermen, in whom the patronage was vested, fifteen were of one party and nine of the other, and that their appointments were made in exactly the same proportions, fifteen twenty-fourths in favour of one party, and nine twenty-fourths in favour of the other; that the inmates of the *Great Hospital* had been introduced as the political supporters of the aldermen, and that there was no instance within his knowledge of a political opponent being selected; that the mayor added, that no improper persons had been admitted, though it was probable that the same individuals would not have been selected, but for their votes. The Commissioners' report declared, that in the instances therein mentioned, and in others, the property and patronage entrusted to the corporation for purposes of charity had been rendered subservient to the purposes of a party; and the report then proceeded to state two cases in which the individual members of the Court of aldermen had had a personal interest in the disposal of such property and patronage; one of which cases was a payment, out of the hospital funds, for the benefit of an alderman, who was a member of the hospital committee, and a tenant of hospital property; and in the other case, an additional charge had been made on the hospital revenues, to provide for

for an increase of salary on the appointment of a person, who was the son of one alderman and the brother of another, to the office of chaplain; the increase having been refused to his immediate predecessor in office, who was not personally connected with any of the aldermen, and when granted to himself, there being an express provision that it should not be drawn into a precedent for his successor.

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One of the two Commissioners, before whom the inquiry into the state of the corporation of *Norwich* had taken place, verified a printed copy of the report, and stated that the inquiry was conducted at *Norwich* by himself and his colleague, in the months of *November* and *December* 1833, and lasted twenty-two days or thereabouts; that, in his opinion and judgment, the report was a true, faithful, and impartial report on the then state of the corporation, as it appeared from the evidence taken by the two Commissioners, and that the whole of the evidence given upon the inquiry, and upon which the report was made, was given publicly, upon the oaths of the parties. The affidavit of *Thomas Edwards*, the present treasurer of the city, stated, that he was present at the inquiry, and heard the then mayor make the statement which is above cited from the Commissioners' report; and the deponent added, that he had been for the last twenty years well acquainted with the state of political parties at *Norwich*, and that the statement so made by the mayor was true. Another affidavit, sworn jointly by Mr. *Edwards* and two other persons, confirmed other statements contained in the Commissioners' report, with respect to the hospital notes, and stated that, upon the Commissioners' inquiry, the then mayor, having mentioned that the great majority of persons admitted into the hospital were freemen, was asked

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whether they were so introduced as the political friends of the aldermen, and that he replied, "Yes, I should certainly introduce my political friends in preference;" but the affidavit added, that in reply to another question, the mayor deposed that he thought very pressing cases had had the preference over political supporters; and that, upon being asked, whether he thought that the same persons would have been introduced into the hospital if they had not been political supporters, he answered, "Not identically the same persons." The deponents added, that they verily believed that the statements made by the mayor were true.

The affidavit of *Edward Massey*, who was a member of the old corporation at the time of its dissolution, stated, that he had been a member of that body for three years, and that, during that time, the members attached to that political party which was in the minority were excluded from committees appointed for the management and distribution of the charity property and patronage.

The joint affidavit of *John Francis* and *William Enfield*, junior, late common councilmen, stated, that it was notorious that the members of the late corporation exercised their funds and patronage as trustees for charitable purposes on the principle of political partisanship; and that the subserviency of the charity funds and revenues to political purposes, as well by the use made of the city money or charity loans, as by the use made of the hospital, by the corporate trustees, was well known, and was proved by evidence on oath before the Commissioners of corporate inquiry, and that the evidence so given was true. They also stated that other particular parts of the statements made
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in the Commissioners' printed report were, as the deponents verily believed, true in substance and in fact.

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On the part of the old trustees, Mr. *Harvey*, who had been elected an alderman in 1787, and a member of the hospital committee in 1800, and had since continued such, deposed, by affidavit, that the statement in the Commissioners' report, that since the Tories gained the ascendancy, no Whig tradesmen had been employed by the committee of the corporation for the management of the hospital, was incorrect.

Another affidavit stated that the present chaplain of the *Great Hospital* had more religious services to attend to than his predecessor, and that the number of the inmates had, during his incumbency, increased from 120 to 176.

Mr. *Beckwith*, late town clerk, stated that at the time of the appointment of the present chaplain, he was speaker of the common council, and that it was at his suggestion that the increase of salary was limited to the present chaplain's incumbency, and that the suggestion was made in order that the common council, whose sanction of the increase was necessary, might have an opportunity of reconsidering the question; the appointment being vested solely in the aldermen. He spoke also to the respectability of the persons proposed by the cross-petitioners for appointment as new trustees.

Seven of the twenty-four late aldermen made affidavits, to the effect, that while they were respectively aldermen, they exercised their patronage in favour of persons whom they conscientiously believed to be proper and deserving objects, and never upon any corrupt or improper principle of political partisanship.

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Mr. *Bignold*, who was mayor of the city at the time at which the Commissioners' inquiry took place, deposed, by affidavit, that he never intended to state, and that he did not believe that he did state, in evidence before the Commissioners, "that it would be impossible in the city of *Norwich* to exercise patronage on any other principle than that of political partisanship," as he had himself exercised patronage belonging to him, as an alderman, without any regard to that principle; and he well knew that others of the aldermen, his personal and political friends, had exercised their patronage as aldermen without being at all influenced by political considerations; that, had the majority of aldermen been influenced solely by the principle of political partisanship they could wholly have excluded the minority from any share in the patronage; instead of which, every alderman, in rotation, was allowed to nominate to vacancies in the several hospitals as they occurred: that what he intended to state, and what he believed he did state, before the Commissioners, amounted to this,—that it was impossible to prevent political friendship from having some influence in the disposition of patronage; thereby meaning, that where two objects of patronage were equally meritorious, an alderman would prefer a person who espoused the political principles of his party to one who supported contrary principles; that as every alderman, in rotation, recommended an object to supply the vacancies which happened in the several hospitals, it was impossible for him to know the principle which actuated each alderman in the recommendation he made: and that as to the alleged statement that fifteen of the twenty-four aldermen were of one party and nine of the other, and that their appointments were made in exactly the same proportion, &c., he intended to convey this meaning, according to the fact, viz. that the aldermen did not appoint to the hospital in a body, in which

case

case the majority would have had the power of making all the appointments in exclusion of the minority, but they allowed every alderman in his turn to recommend an object of patronage as the vacancy occurred; in consequence of which practice the proportion in which political partiality might be supposed to influence the appointments would be in the same proportion as the number of aldermen of each; that he did not and could not mean that fifteen twenty-fourths of the persons placed in the hospital were of one party, and nine twenty-fourths of the other, as a considerable number of the persons placed in the hospital were not voters at all: that as to the allegation that the inmates of the *Great Hospital* had been introduced as the political supporters of the aldermen, he did not mean to impute that political supporters were improperly or corruptly introduced, but merely meant to state that where persons, espousing the same political party as the aldermen, were proper and deserving objects for the charity, they were frequently recommended to be placed in the hospital by such aldermen: that as to the allegation that there was no instance, within his knowledge, of a political opponent being selected, it must have been made in answer to a question put by the Commissioners, whether he knew of an alderman having appointed a political opponent to the hospital, and merely amounted to this, that, during the two or three years he had been an alderman, he did not know that any alderman had selected a political opponent; and he might have added, that he did not know that an alderman had not done so, and which he had since found to be the case: that during the time he was an alderman, he conscientiously exercised the patronage belonging to him as such, and recommended such persons as, according to the best of his judgment, he deemed proper objects to be placed in the several hospitals; and that he made no corrupt or improper

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proper appointment of any person to receive the benefits thereof.

An affidavit, sworn on the part of the petitioners in the cross-petition, verified a copy of notes, taken at the Commissioners' inquiry, by a clerk of the then town clerk of the city; and in these notes, Mr. *Bignold* was represented as having made statements to the following effect; viz., that he had no doubt but persons, being proper objects, had been introduced into the hospital in consequence of their voting: that in answer to the question, "Has the greater part of those so introduced (viz., into the hospital) been so introduced by their political friends?" Mr. *Bignold* replied, "Certainly: I should certainly introduce my political friends in preference to others;" and that he said, that the loans were not granted for party purposes.

The Master, after receiving this evidence, although it was objected to by the parties who now presented the cross-petition, came to the conclusion, that it would be improper to select any person as one of the new trustees who had been a member of the old corporation; and he wrote a memorandum to this effect; viz., that, "after careful consideration of the case made against the old trustees," he was of opinion that he should not be justified in re-appointing any of them.

The Master then proceeded to nominate two sets of trustees, one of which sets consisted entirely of members of the Church of *England*; under whose superintendence the Master placed all those charities which he considered to be essentially of the character of Church of *England* charities: and the other set of trustees, consisting of twenty-one individuals, comprised seventeen members

members of the Church of *England*, and four dissenters ; under whose superintendence, the Master placed all the remaining charities.

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The charities called the *Boys' Hospital* and the *Girls' Hospital*, were two of those which were placed under the superintendence of the mixed body of trustees. The following particulars with respect to the history of those charities, except such as are expressly cited from the affidavits filed in support of the cross-petition, are taken from the report of the Commissioners of Charities, dated the 10th of *July* 1833, and printed by order of Parliament in the year 1834, and which, by the consent of both parties, was received in evidence before the Master, and also afterwards before the Lord Chancellor.

The Boys' and Girls' Hospitals, though they are now in every respect distinct, derive their origin from the same founder, were established under the same charter, and were originally one establishment, called *The Children's Hospital*.

Thomas Anguish, by his will, bearing dated the 22d of *June* 1617, devised to the mayor, sheriffs, citizens, and commonalty of the city of *Norwich* and their successors, the east part of his houses, yards, and grounds, with the appurtenances, in the parish of *St. Edmund of Fishergate* ; to hold the same for ten years after his decease, to the uses thereafter mentioned ; and he desired, that when the said mayor, sheriffs, &c. should have possessed the same for ten years after his decease, the said premises should be from thenceforth let for terms of seven or ten years at the most ; that they should be kept in repair out of the rents and profits, until, by some godly-minded man, or by the general charge of the city, a hospital or convenient place for the

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the keeping, bringing up, and teaching of young and very poor children, born and brought up in the city of *Norwich*, should be erected: and he declared that he gave the said premises, to the intent that, if it should be thought convenient, the same, being large, spacious, and well built, and having many rooms therein, might, after the ten years, be employed for the placing a master and dame, or other teachers, to bring up children that should be very poor, and should not have friends to help them, from the age of five, six, or seven years to fourteen or fifteen, to be taught in the mean time according to their disposition, as that they might be fitting for service, or able to maintain themselves by their work: and the testator stated that, upon viewing the said premises, he supposed there might be found convenient chambers therein for the placing and lodging boys by themselves and girls by themselves, in forty beds at least, and sufficient rooms besides for a master, dame, and servants, and low rooms to place the said children to work in; and such use of the said premises he referred to the mayor, sheriffs, &c., for the time being, to be ordered by them as in their discretion might be thought most fitting, until a better house or room might be appointed to the like use: and he directed that as soon as any house more fitting should be bought by the city, or given by some godly-disposed person, or if the premises given by him should not be thought fitting for the purposes aforesaid, as soon as the term of ten years had expired, the said premises should be let, and that the clear rents and profits should remain for and toward the better maintenance, clothing, bedding, and keeping of such poor children as should be put to be brought up in any other more convenient place within the said city: and if neither the premises given by him should be found convenient, nor any other place be given for the purpose, he directed that the
overplus

overplus of the rent, after paying for the repairs, should be applied by the mayor for the time being, and four of the ancientest aldermen of the wards of *East Wymer*, *Coslany*, *Fybrigge*, and *North Conisford*, for the helping and curing of poor distressed men, women, and children that should be hurt by falls or otherwise, or should be diseased and likely to be cured, as also for and towards the clothing of poor children, and especially towards helping and curing poor children that should not have friends to help them, and that should be cut for the stone or ruptured, as many had been, and for placing persons that should be diseased and thought incurable, in the lazar-houses near the gates of the said city; and this course to be continued till a hospital should be founded for the bringing up and keeping poor diseased children.

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The premises devised by *Thomas Anguish*, in the parish of *St. Edmund*, are now used for the boys' hospital.

Emanuel Garrett, by will in the year 1618, bequeathed to the mayor, sheriffs, &c. 100*l.* to be employed towards the education and bringing up poor children within the hospital in *St. Edmunds*, according to the intent of *Thomas Anguish*. *Henry Fawcett*, by will in the year 1619, gave 100*l.* towards the erecting and maintenance of the hospital given by *Thomas Anguish*. *Thomas Tesmond*, by will, in the year 1626, confirmed afterwards by his heir, devised certain lands in *Bixley* to the mayor, sheriffs, &c. and their successors, to the intent that they should pay 20*l.* per annum for the purposes therein mentioned; and that the residue of the rents and profits should be employed towards the maintenance of poor orphans and children whose parents should not be able to maintain them in the new hospital then lately provided within the city of *Norwich* for the education of such poor children.

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By letters patent, bearing date the 28th of *November*, 4 *Charles I.*, reciting that the King had taken into consideration the miserable condition of many poor sick and diseased orphans, and children of poor parents, within the city of *Norwich*, which was a place fit to employ and set them on work, if, in their tender years, there were means to educate and nourish them, until such time as they should come to be able to work; and reciting the will of *Thomas Anguish*, bearing date the 22d of *June* 1617, and the will of *Thomas Tesmond*, bearing date the 7th of *July* 1626, and that divers others persons had given, and many others intended to give, to the mayor, sheriffs, &c. lands, tenements, and money for the charitable purposes aforesaid; that the said mayor, sheriffs, &c. had already converted the premises given by the said *Thomas Anguish* to the lodging and feeding of such poor children as were mentioned in the said will, and intended the advancement of the said work with what speed they could, and to lay out all such legacies and sums of money as should come to their hands for that purpose, in purchasing lands, tenements, and hereditaments, and with the yearly profits thereof to maintain, in the said houses, devised by the said *Thomas Anguish*, such and so many poor children mentioned in the said will, and such and so many officers and other persons convenient to be employed in their government, and making their provision, as the said revenues would, from time to time, extend unto: the King granted to the mayor, sheriffs, &c. and their successors, licence to take and enjoy the said devised premises for the purpose aforesaid, and that the said houses devised by the said *Thomas Anguish*, and the yard and grounds thereto belonging, should continue for ever a hospital and place of sustentation, relief, and maintenance of poor children, in such sort as in the will of the said *Thomas Anguish* was mentioned, to
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be called *The Children's Hospital, of the Foundation of King Charles*; and licence was granted to the said mayor, sheriffs, &c. to take lands, tenements, and hereditaments to the yearly value of 300*l.*; and it was declared that it should be lawful for the mayor and aldermen, or the greater number of them, as often as it should seem expedient to them, to make constitutions and rules for the right governing of the said poor children in the said hospital, so as the same should not be repugnant to the law, or to the provision of any of the donors to the charitable uses aforesaid; and also to create such and so many officers, ministers, or governors of the said house, to provide for and govern the said children, as to them should seem meet, and to receive into the said hospital any children whatsoever born in the said city, suburbs or hamlets thereof, being under the age of ten years, and to maintain, educate, teach and instruct in learning, set on work, and otherwise dispose of, as many such children as the revenues would extend to, as to them should seem convenient, and to discharge the said children and all the officers of the said hospital from year to year or day to day, at their will and pleasure.

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After the date of the charter of *King Charles the First*, various benefactions were made to the *Children's Hospital*, and also to the *Boys' Hospital* and the *Girls' Hospital* respectively. One of these was a devise of lands in 1666, by *John Vaughan*, who directed the rents to be applied to the support of six boys in the hospital; such boys being presented, alternately, by the corporation of *Norwich*, and the vicar, churchwardens, and overseers of the parish of *Saxthorpe*. The premises in *St. Edmund's* parish, devised by *Thomas Anguish*, to be converted into a hospital, consist of a dwelling-house, in which the master of the *Boys' Hospital* resides with his mother, who is the mistress

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tress of the *Girls' Hospital*, and of a yard, with a school-room for each establishment. The clear income of the *Boys' Hospital* is applied in the educating, maintaining, clothing and apprenticing sixty-one boys. One of these is recommended by the minister and churchwardens of the parish of *Saxthorpe*, in respect of *Vaughan's* gift, and others are appointed upon the recommendation of the parish officers of different parishes in *Norwich*, in respect of various other benefactions. The rest are nominated by the aldermen in rotation, as vacancies happen. All the boys are admitted at a court of mayoralty. Up to the year 1798, the boys were lodged and maintained in the hospital, and there were at that period twenty-one boys thus provided for; it was, however, thought expedient to alter this system, and in 1798 the number was increased to thirty, and the yearly sum of 10*l.* was allowed to the parents or friends of each boy, who were to provide him with lodging and maintenance, and also to pay the master of the hospital for his education. The same sum is still paid for each boy, but the number has been gradually increased from thirty to sixty-one.

The master of the hospital, who, by this new arrangement, has no other duty but that of schoolmaster, is appointed by the mayor and aldermen. Out of the yearly allowance of 10*l.* are paid the charges of the master for stationery, and a certain quarterage of 5*s.*, 7*s.*, or 8*s.*, according to what the children learn; and the residue remains as a fund for maintaining them. Each boy receives annually, at *Ladyday*, a blue cloth jacket, a pair of trowsers, a stuff waistcoat, and a red cap.

By one of the rules established by the mayor and aldermen, the boys are required to meet at the school every *Sunday*, and to go thence, with the master, to the cathedral.

cathedral. They are examined once a year by the committee, and are catechised, annually, by the minister of *St. Edmund's*.

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Up to about the year 1650, boys and girls were maintained, lodged, and educated together in the hospital, in the parish of *St. Edmund's*, now called the *Boys' Hospital*. The foundation of a separate hospital for girls is attributed to *Robert Baron*, who died in the year 1649, and who, by will, bequeathed to the city of *Norwich* 250*l.*, which it was his desire should be employed for the training up of women children, from the age of seven till fifteen, in spinning, knitting, and dressing wool, under the tuition of an aged, discreet, religious woman, appointed thereto, at some public place, by the magistrates' appointment; hoping that some other would add to the same, that it might become a means of great benefit to the city and comfort to the poor: and he desired that the same should be paid within one year after his decease, in case some place should be appointed thereto by the city, and an overseer thereof as aforesaid.

To this bequest several other benefactions were subsequently added.

The management of the property, and of the whole establishment, is under the same committees, and the accounts are kept by the same treasurer as those of the *Boys' Hospital*.

Up to the year 1802 the girls were supported in a particular building. In that year an alteration in the system was adopted, similar to that made in the *Boys' Hospital*. The number of girls was increased from twenty-two to twenty-four, and it was agreed to allow the sum of 8*l.* to the parents or friends of each girl, who were

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therewith to maintain and educate her, paying to the schoolmistress or master appointed for the purpose by the mayor and aldermen, 7s. 6d. per quarter, and the charges for stationery and books usual in other schools. The number of girls was increased in 1807, to thirty-two, and in 1824, to forty-four. The girls are taught needlework in a schoolroom appropriated to their use, (part of the *Boys' Hospital* in *St. Edmund's* parish) by the schoolmistress, on three days in the week; and on the other three days of the week they are taught reading, writing, and accounts by the master of the boys' hospital in the same schoolroom with the boys. The girls are appointed by the aldermen in rotation, except such as are appointed from different parishes in respect of particular donations; and they are all admitted at a court of mayoralty.

The same school hours and the same holidays are prescribed for the girls as for the boys, and the girls are examined and catechised in the same manner, and also required to attend at the school every *Sunday*, and to go from thence with the master to the cathedral.

The Charity Commissioners' report cited from *Blomefield's History of Norfolk* (a) a statement, that in the year 1623, certain lands were settled upon the city on condition that yearly, for ever, on the feast of the *Epiphany*, there should be a sermon in the afternoon in the church of *St. Edmund*, by a licensed preacher chosen by the mayor; and that the corporation should pay yearly 6s. 8d. to the preacher, and that the names of all the benefactors should be read in the church, out of a book to be kept for that purpose. The report of the Commissioners of Charities stated, that that sum is paid to the

(a) See vol. ii. p. 785., ed. 1739.

the preacher on or about the 6th of *January* in each year, on which occasion a sermon is preached, and a list of the benefactors to the *Children's Hospital* read in the church of *St. Edmund*. (a)

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The petitioners in the cross-petition submitted, that it would be an entire departure from the principle of the foundation of these charities, to place them under the administration of any trustees not being members of the Church of *England*, at least so long as competent members of the Church of *England* were to be found, and that they ought to be placed under the administration of the first mentioned set of trustees.

The cross-petition prayed that the Master's report, as to the appointment of trustees, might not be confirmed; and that it might be referred back to him to review his report in that behalf, with such declarations or directions as might be necessary to prevent all objection to the appointment of the petitioners and the other persons therein mentioned, or any other persons, on the ground of their having been formerly, and previously to the 1st of *August* 1836, members of the late corporation of *Norwich*: and further, that the report might not be confirmed, so far as the mixed set of trustees were appointed to be trustees of the *Boys' Hospital* and the *Girls' Hospital* respectively; and that those charities might be comprised in the number of Church of *England* charities, and placed under the administration of the set of trustees consisting exclusively of members of the Church of *England*.

The following affidavits were filed in support of the cross-petition, in addition to those before mentioned.

The

(a) pp. 592, 593.

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The affidavit of Mr. *Beckwith*, late town clerk, and previously chamberlain of the city, stated, that it appeared, by an entry in the corporation books, that at an assembly, held on the 13th of *November*, 18 *Jac.* 1., anno 1620, certain orders were made for establishing "*The Orphans' Hospital*," and that it was ordered that part of the house given by *Thomas Anguish* should be fitted up for the orphans; that ten boys and two girls should be admitted; that there should be a master and dame appointed to keep them, and a schoolmaster to teach them to read: and that eight governors of the house were also chosen; four being aldermen, and four being common councilmen: and that the following entry was made of the proceedings at a court of mayoralty, consisting of mayor and aldermen, held on the 5th of *January* 1621; viz. "5th of *January* 1621; It is thought fit that Mr. *Fermely*, for catechising the children in the new hospital, shall have paid him xiiis. iiid., and that he shall have henceforth yearly xiiis. iiid. for so long tyme as he shall contynue to catechise the said children: to be paid quarterly:" that among the ordinances for the government of the hospital made in the year 1631, and reported to the court of mayoralty in the year 1632, was the following:—"That the boyes shall, every sabbath day, come to the sermon in the cathedral church in blew coates and in cappes, conducted by an officer for that purpose, which officer shall have 12*d.* a quarter paid him by the treasurer of the said hospital for the time being: and that the said boyes shall, in like habbitt, attend upon the sword, when warning shall be given to the keeper or the said other officer, conducted in decent manner by the officer aforesaid."

The same affidavit further stated, that prior to the boys and girls being maintained out of the hospital, the boys, under the superintendence of their master,
 and

and habited in blue coats and red caps, and the girls, under the superintendence of their mistress, and habited in blue gowns, were accustomed to attend divine service at the cathedral on the *Sunday* forenoon in summer, when the mayor and aldermen with the city officers and regalia attended divine service there, where seats were appropriated for their use; and that on the *Sunday* forenoon in winter, and on the *Sunday* afternoon, the boys attended either the church of *St. Edmund*, or the church of *St. Martin* at the Palace, in each of which churches seats were appropriated for their use; and that on the *Sunday* forenoon in winter, and on the *Sunday* afternoon, the girls attended divine service at the parish church of *St. Saviour*, when service was performed there, and were catechised annually by the minister of that parish. The same affidavit went on to state that the deponent's father, the Rev. *Thomas Beckwith*, clerk, who died in the year 1807, was upwards of fifty years the minister of *St. Edmund's* parish, and that the deponent was in the frequent habit of attending divine service at the church of that parish, from the year 1791 to the year 1807, and had frequently heard the hospital boys and girls catechised in that church, between the prayers and sermon, they standing up in the aisle before the reading desk; such catechising taking place in the time of *Lent* annually; and that the deponent had also been present at several of the commemoration sermons, when the mayor, aldermen, and certain of the common council, and the city officers, with the boys and girls, attended, and had heard the list of benefactors read over by the minister, and had heard his father state, that that sermon was always preached annually on the *Sunday* after the *Epiphany*, and that he received 6s. 8d. for preaching it, and that he also received some payment, (but what the deponent did not remember,) for catechising the children; and that while he (the deponent) was cham-

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berlain and town clerk, he attended the commemoration sermons, as one of the city officers; and that while he was chamberlain he caused the sum of 1*l.* 6*s.* 8*d.* to be annually paid to the sword-bearer to make certain payments; one of which was, the 6*s.* 8*d.* to be paid to the preacher for the commemoration sermon.

The affidavit of Mr. *Day*, late one of the aldermen of the city, and treasurer of the boys' and girls' hospitals, stated that he had been treasurer for eight years; and during that time, had yearly paid to the minister of *St. Edmund's* parish, the sum of 1*l.* 1*s.* for catechising the children in the hospitals, and which payment he believed had been made for a long series of years.

The affidavit of Mr. *Morse*, late one of the aldermen of *Norwich*, stated that he was elected an alderman in the year 1777, and in the year 1794 was appointed one of the committee to superintend and visit the *Children's Hospital*: that the deponent had been well acquainted with the management of the *Children's Hospital* ever since he was elected an alderman, and more particularly since he was appointed one of the committee of superintendence; and that he had always heard and understood that the same was a foundation for educating children in the principles of the established church; and that during all the time he had known the hospital, the children had been educated in the principles of the established church, and had been instructed in the church catechism on one day in every week, and that no other religious doctrine had been taught in the school: that he had heard and verily believed, that it has been the custom from near the time of the foundation of the hospital, and which he knew to have subsisted for a great many years, for the children under the superintendence of the master

ter and mistress, and habited in the dress of the hospital, that is to say, the boys in blue coats or jackets and red caps, and the girls in blue gowns, to attend divine service at the cathedral on *Sunday* mornings, whenever the mayor and aldermen went in state to the cathedral; and that seats are appropriated for the children in the choir: that for about thirty years past the boys and girls have met at the school on every *Sunday* morning (except during the holiday time) and gone in procession, accompanied by the master and mistress, to attend divine service at the cathedral, and have been annually in *Lent* catechised by the minister of *St. Edmund's*: that, from the time from which the deponent had known the hospital, up to the year 1836, a commemoration sermon had been annually preached on the *Sunday* next after the *Epiphany*, at which the mayor and aldermen and certain of the common council, accompanied by the city officers and regalia, used to attend; and the names of the benefactors of the hospital were read by the minister, between the prayers and sermon, from a book kept for that purpose; that on the *Wednesday*, in *Easter* week in every year, a sermon called the *Spital* sermon was preached at *St. Helen's* church in the city, in the chapel of the *Great Hospital*, to which the mayor, aldermen, and sheriffs of the city went in procession, accompanied by the inmates of the *Great Hospital*, and *Doughty's Hospital*, and the children in the *Children's Hospital*. The deponent added, that considering the *Children's Hospital* to have been established for the bringing up of children in the principles of the established church, and knowing it to have been conducted on those principles for many years, and presuming it would so continue to be, he, on the 27th of *January* 1815, gave the sum of 80*l.* 5 per cent. Bank annuities to the corporation of *Norwich*, as a benefaction to the *Children's Hospital*, which he should not have done, had he sup-

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posed, that any other system of religious instruction would or could be introduced; that the number of boys in the establishment, when full, is sixty-nine, and of the girls fifty.

Two sons of Mr. *Browne*, a deceased alderman, deposed, that their father, in his lifetime, gave two several sums of 100*l.* to the corporation of *Norwich*, as a benefaction to the *Children's Hospital*; and that from the opinions expressed and entertained by their father, they knew that he considered the *Children's Hospital* to have been established for the instruction and bringing up of children in the principles of the established church; and that his reason for appointing certain money to be paid to the children, on the anniversary of King *Charles's* restoration, was, by bringing that event to their remembrance, to create and promote in their minds a feeling of attachment to the constitution in church and state; and that the deponents' father would not have given the benefaction, had he supposed that any other system of religious instruction would or could be introduced.

Mr. *Wigram* and Mr. *O. Anderdon*, in support of the cross-petition.

The petitioners and the other gentlemen proposed by them, were perfectly free from personal objection. The Master ought, at the very least, to have considered the personal claims of the individuals who were proposed from among those who had belonged to the old corporation; but he did not even do that. The Master ought not to have received in evidence the report of the Commissioners of Corporation Inquiry; for their investigation was a wholly *ex parte* proceeding. The Master has proceeded upon an entirely erroneous principle, in refusing to consider the claims of individuals, merely because they happened to form part of a particular body or class.

It

It is clear that *The Children's Hospital*, divided, as it now is, into the *Boys' Hospital* and *The Girls' Hospital*, is a church of *England* charity; and its benefits have always, in fact, been confined to the children of members of the church of *England*. King *Charles* the First is not likely to have given it a charter, unless it had been, at the time, a church of *England* foundation. It will be observed, that clergymen of the church of *England* are appointed preachers, and the children are taught the church catechism; and they have a particular dress, a circumstance which is peculiar to church of *England* charities. Suppose the trustees should be Dissenters, and should appoint a Dissenting master and mistress; the minister who catechises, and the catechism itself, would be excluded. Systems of management according to the church of *England* and according to the opinions of Dissenters cannot stand together; it is impossible to draw the line between them. The invariable usage, as to this charity, as stated in the petition and affidavits, concurs with the history of the times in which it was founded and chartered, to prove that its character is essentially that of a church of *England* charity.

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The *Solicitor-General* and Mr. *Blunt*, for the Master's report.

The ground upon which the Master declined to appoint any members of the old corporation was, that, to say the least, there was a great suspicion that the old corporation, as trustees of the charities, had not dealt with the object of their trust upon the only principles upon which they ought to have dealt with it. A very large portion, however, nearly one half, of the individuals proposed by Mr. *Wigram's* clients, were selected by the Master, as new trustees. In such a place as *Norwich*, a great number of perfectly fit persons can be found. No-
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body can say that he has a right to be appointed a trustee; and the Master has preferred to take persons of equal respectability, who had not belonged to the old corporation. No objection whatever has been made to the individuals whom the Master has chosen. If a person were now to found a charity, he would select, for his trustees, persons not only perfectly respectable, but to whom no suspicion could, by possibility, attach. The report of the Commissioners of Corporation Inquiry was quite sufficient evidence for the Master, upon a matter of this kind; it shewed the nature of the complaints which existed with respect to these charities. It was, besides, verified by one of the two Commissioners by whom it was made; and the statements contained in it, were supported by the affidavit of Mr. *Edwards*, who was present, during the Commissioners' inquiry, and who heard Mr. *Bignold*, one of the petitioners in the cross-petition, and who was mayor at the time, declare to the Commissioners, that it would be impossible to exercise patronage in *Norwich* upon any other principle than that of political partisanship. When the Master speaks, in his memorandum, of "the case made against the old trustees," he means the case made against the fitness of the old trustees, on account of the suspicion which existed against them.

As to the second part of the case,—Is there any thing in the charter to exclude Dissenters as objects of charity? There are children of Dissenters in almost all the chartered schools; and they do not go to church. Suppose that upon the charity, as originally constituted, there has been engrafted something connected with the church, the only consequence is, that, to that extent, it is a church charity. The only thing of that kind appears to be the settlement of 13s. 4d. annually, for catechising the children; but it does not appear that
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Dissenters' children were not to be catechised; and it is well known that the children of Dissenters are catechised just as much as the children of members of the church of *England*. The allowance for catechising, which is still confined to the sum of 13s. 4d. annually, cannot affect the character of the gifts made before or after it was fixed. There was nothing to lead the Master to the conclusion that this was a church charity.

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[*The* LORD CHANCELLOR.

I see that Mr. *Anguish's* will declares the same trust for the foundation of a general hospital for men and women as for the children's hospital; but is it meant to be contended, that the general hospital is a church of *England* charity? I can see nothing to distinguish, in point of intention, between the two charities. I want to know "whether a poor man, woman, or child, that should be hurt by a fall or otherwise," was to be left to perish in the street, because not of the church of *England*?" [Mr. *O. Anderdon*. No such general hospital as your Lordship refers to is in existence.] [*The* LORD CHANCELLOR. That circumstance makes no difference, in looking to what the intention of the founder was.]

The only question now is, whether your Lordship shall decide that this is an exclusively church of *England* charity, and that children, belonging to that communion, shall alone have the benefit of it. If it should be thought proper that the children should be catechised in *St. Edmund's* church, that regulation may be embodied in a scheme to be settled hereafter. The founder seems to have had a general object of benevolence, and to have intended to establish a place of maintenance and education for the young, and relief for the aged and afflicted.

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The present question, however, is not how the charity is to be regulated, but who are to be its trustees. There is no case in which the Court has said that Dissenters shall not be trustees, except in the instance of charities which are in their nature distinctly connected with the church of *England*. It is material to bear in mind that, at the date, not only of the founder's will, but also of the charter, Dissenters might have been members of the corporation, and, consequently, trustees of this charity; for the act which excluded them from corporations was not passed until the 13 *Car. 2. (a)*, in the year 1661. Since the repeal of that act, Dissenters have been members of corporations, and at the very time of the passing of the late act, under which these new trustees are appointed, Dissenters were members of the corporation of *Norwich*, and consequently trustees of this charity. When the legislature repealed the act of 13 *Car. 2. (b)*, it did not think it necessary to make any provision, which should exclude Dissenters from being, in their corporate character, trustees of any charities whatever. After all, out of twenty-one persons who compose the mixed body of trustees, four only are dissenters.

Mr. *Wigram*, in reply.

The petitioners do not claim any *right* to be appointed trustees; but they do claim a right to have their claims to such an appointment considered. The Master seems to have thought that a case of misconduct was made out against the old trustees.

The founder of the boys' and girls' hospitals intended that the children should be instructed in religion. Can it

(a) 13 *Car. 2. st. 2. c. 1. s. 12.*

(b) See 9 *G. 4. c. 17.*

it be supposed that he was indifferent as to what religion they should be taught? Could he have intended that there should have been on one day a master of one religion, and on another day a master of another religion? These charities have always been, in fact, church of *England* charities; and the usage in that respect is evidence of what the original foundation was.

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The LORD CHANCELLOR.

Upon the first part of the case, if it had not been for the memorandum made by the Master, the question is one which the Court would not have allowed even to be stated; for it is the well established rule, that the Court gives credit to the Master's report of the appointment of trustees, unless the parties complaining can shew some objection to the persons who have been selected. Now, against the individuals appointed in this case, no allegation of any sort or kind is made; and the only case of the petitioners is, that the Master, in the memorandum which he has made of the grounds upon which he proceeded, uses this expression, viz., "After careful consideration of the case made against the old trustees, I am of opinion that I should not be justified in re-appointing any of them." It becomes, therefore, incumbent on me to consider whether there was sufficient ground for excluding from the number of the new trustees the individuals who formed the body of the old trustees. It is obvious that the Master only meant, that those who had been the old trustees had been acting under such circumstances, and in such a manner, as had (whether rightly or not) given rise to the suspicion of their exercising their trust for party purposes; and he thought it expedient, in selecting a body of new trustees,

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tees, to appoint others who were not liable to suspicion, or to discussion, or invidious remark. What is stated with respect to the foundation for such a suspicion, I have on the best possible evidence, that of Mr. *Big-nold's* own affidavit, explaining another which had been made on the other side. I do not think that there are any material discrepancies between the two affidavits. It is stated, that the corporation, being the trustees of these charities, divided the patronage among themselves, and that the patronage was used, in fact, for the purposes of political party and influence in *Norwich*; that the decision, or balance, was always turned in favour of the person who happened to be of the political party of the alderman whose turn it was to make the appointment. Anything more inconsistent with the objects of the charities could not well be thought of. Can any body say that that is a proper administration of the charities?

Nothing could be more injurious, nothing more to be avoided, than to stir again all the feelings of suspicion which had before existed.

There the feeling exists: it may be, quite independently of any really improper conduct on the part of the old trustees; but if the Master were again to plunge the charities into all the suspicion and contest which have heretofore prevailed, he would very ill execute the duty he had to perform. Seeing this to be the case, I think the Master has done very wisely in endeavouring, if possible, to deliver these charity funds from this party feeling which has unhappily so much prevailed. Against the individuals appointed by the Master no case is made. I think the Master was not only perfectly justified in the course which he has adopted, but that he would have acted extremely improperly,

properly, if he had not endeavoured to rescue the charity funds from this liability to suspicion.

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As to the other point raised by the cross-petition, I am asked to vary the Master's report, by placing the boys' and girls' hospital, under the care of a different set of trustees, from that under the care of which the Master has placed them.

The Master, in selecting new trustees, has, with my entire concurrence, whenever the charity was for church purposes, selected, as trustees, persons who were members of the church of *England*. It has been thought proper, that when the object of the trust has been exclusively connected with one particular religious party, the trustees who were to have the control over it should be of the same religious party.

The question is, what are to be considered church purposes. When I look to this foundation, I can find nothing alluding to a church purpose; and I cannot hold, because I may have reason to suppose that *Thomas Anguish*, when he made his will in the year 1617, was a member of the church of *England*, that, therefore, he intended that the only objects of his charities should be persons who belonged to the church of *England*. He could easily have declared such an intention, if he entertained it.

His object was to found a hospital "for the keeping, bringing up, and teaching of young and very poor children that should not have friends to help them."

Mr. *Blunt* has very properly observed, that members of the corporation might then have been Dissenters.

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The founder declared that he gave the premises to the intent, that, if it should be thought convenient, the same, being large, spacious, and well built, and having many rooms therein, might, after the ten years, be employed for the placing a master and dame, or other teachers, to bring up children that should be very poor, and should not have friends to help them, from the age of five, six, or seven years, to fourteen or fifteen, to be taught in the meantime according to their disposition, as that they might be fitting for service, or able to maintain themselves by their work.

Then, having so established the school, he directs, that if neither the premises given by him should be found convenient, nor any other place be given for the purpose, the overplus of the rent, after paying for the repairs, should be applied for the helping and curing of poor distressed men, women, and children that should be hurt by falls or otherwise, or should be diseased and likely to be cured, as also for and towards the clothing of poor children, and especially towards the helping and curing of poor children that should not have friends to help them, and that should be cut for the stone, or ruptured, as many had been, and for placing persons that should be diseased and thought incurable in the lazar houses near the gates of the said city; and this course to be continued, till a hospital should be founded for the bringing up and keeping poor diseased children.

Now I am told that these charities have been confined exclusively to persons belonging to the Church of *England*. In order to justify such an administration of the charities as this, it must be found in the terms of the foundation. The royal charter, which refers to the purposes for which the institution was established by Mr.

Anguish,

Anguish, provides that the charity of the *Children's Hospital* shall continue "in such sort as in the will of the said *Thomas Anguish* was mentioned."

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According to the terms of the charter, the mayor, sheriffs, &c., were "to maintain, educate, teach, and instruct in learning, set on work, and otherwise dispose of as many such children as the revenues would extend to, as to them should seem convenient."

There is nothing, then, in the charter, at all alluding to any exclusive description of parties, who were to share the benefits of the charities; and all that can be said is, that there is a subsequent gift or settlement of 13s. 4d. to be paid to a clergyman of the Church of *England* for catechising the children; and that is, no doubt, highly beneficial; whatever the object of the charity may be, as to confining it or not to a particular class; for, if members of the Church of *England* send their children to the school, it is very fit that they should be catechised by a clergyman of their own church. That, however, is no reason why I should infer that the original institution was intended to be confined to the children of members of the Church of *England*. It is quite impossible that any superadded gift can alter the original purpose of the foundation. I am not called upon now to lay down any rules for the future support and regulation of the school. My principle has been, to confine the trustees to members of the Church of *England*, where I found that the foundation was exclusively confined to the purposes of the Church of *England*. I do not find that here.

If I thought that there was any danger that the rules, which have for the time past been observed with respect

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to this charity, were likely to be departed from, it might require more consideration ; but when I find that out of twenty-one trustees who have been now selected, only four are not members of the Church of *England*, it is impossible to suppose that there is any real danger of altering the course of management and education which has heretofore prevailed.

If, on the other hand, I should say that the Master was wrong in appointing the four trustees who are not members of the Church of *England*, I could only come to that decision, upon the ground that I found something in the charter, or in the constitution of the charity, which would lead me to conclude that it was meant to be exclusively confined to the children of members of the Church of *England* ; and I should then be, in fact, excluding all others from it.

For this, there are no grounds ; and as I am quite sure that, in confirming the Master's report, I incur no risk of altering the management of the charity, the petition must be dismissed with costs.

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BETWEEN

March 16.

SARAH PHILLIPO, Widow, MARTHA GOGGS,
Widow, and ANN JOHNSON, Widow, Plaintiffs;

AND

JAMES MUNNINGS, - - Defendant.

MATTHEW BUSCALL, of *Fakenham*, by his will, dated the 19th of *October* 1785, amongst other bequests, gave the sum of 400*l.* to *Edmund Buscall*, upon trust to place the same out at interest upon real or government securities, and to pay the interest and dividends to the testator's sister, *Sarah Buscall*, for her life; and after her decease, to pay and apply the interest and dividends, or so much thereof as should be necessary, for and towards the maintenance and education of *John Buscall*, son of *Matthew Buscall*, of *Fransham*, until he should attain his age of twenty-four years; and then in trust, in case the testator's sister should then be dead, and if not, then, on her decease, to assign, transfer, and pay the legacy of 400*l.* and all interest then due and unapplied as aforesaid, and the securities on which the same should be invested, to *John Buscall*, to and for his own use. The testator bequeathed certain legacies in trust for *Philip Buscall* and *James Buscall*, and the Plaintiffs, by their names of *Sarah Buscall*, *Martha Buscall*, and *Ann Buscall*, therein also described as the children of *Matthew Buscall* of *Fransham*. And the testator declared that if any of them, *Philip Buscall*, *John Buscall*, and *James Buscall*, *Sarah Buscall*, *Martha Buscall*, and *Ann Buscall*, should happen to die before his, her, or their legacy or legacies should become payable, then the legacy or legacies of him, her, or them so dying, and all interest, if any, then due thereon, and unapplied

A suit to make an executor account for a sum of money which had been bequeathed to him by his testator upon certain trusts, and which had been severed by the executor from the testator's personal estate, and the interest of which had, for a time, been applied upon the trusts of the will, is not a suit to recover a legacy, within the meaning of the Limitation Act, 3 & 4 W. 4. c. 27.

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for maintenance as aforesaid, should be equally divided and paid to and amongst the survivors and survivor of them, share and share alike, at such time and times as his, her, or their original legacy should become payable. And the testator appointed *Edmund Buscall* his executor.

Sarah Buscall died in the testator's lifetime.

The testator died on the 31st of *January* 1787, leaving *Philip Buscall*, *John Buscall*, *James Buscall*, and the Plaintiffs, and *Edmund Buscall* surviving; and *Edmund Buscall*, shortly after the testator's decease, proved the will, and possessed the testator's personal estate, and paid all the debts and legacies, other than the legacy of 400*l.*, and set apart the sum of 400*l.* to answer that legacy. In the year 1799, *Edmund Buscall* died, having appointed the Defendant, *James Munnings*; his executor, who proved his will.

The bill, which was filed on the 18th of *August* 1834, stated that *Philip Buscall* died in the year 1797, and that *John Buscall* died in the year 1800, under the age of twenty-four years, leaving the Plaintiffs, and *James Buscall* surviving him; and that *James Buscall* died in the year 1814, intestate, and without having been married, leaving the Plaintiffs his only next of kin, and that they had commenced proceedings, and intended forthwith to procure letters of administration to his effects. It alleged, that the Defendant had possessed himself of the 400*l.*, or of the securities upon which that sum had been invested, and that he had refused to pay it to the Plaintiffs, but intended to convert it to his own use; and it charged that he had received the interest or dividends, and had converted them to his own use. The bill prayed that it might be declared that the Plaintiffs, in their own right, and as the next of kin of *James Buscall*, in the events which had happened, were beneficially interested

interested in, or entitled to, the whole of the principal sum of 400*l.*, or the stocks or funds or other the securities, if any, upon which the same had been invested, and also the interest and dividends accrued upon or in respect of the same; and that the same might be paid or transferred or accounted for by the Defendant to the Plaintiffs; and that the necessary accounts might be taken; that the Defendant might be restrained, by injunction, from parting with the 400*l.* or the securities upon which the same had been invested; and that that sum, or such securities, and the arrears of interest and dividends received by the Defendant, might be paid or transferred into the name of the Accountant-General, in trust in the cause.

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The Defendant, by his answer, stated and admitted that *Edmund Buscall*, out of the personal estate of the testator *Matthew Buscall*, paid all his debts and funeral and testamentary expenses, and all the legacies given by his will, except the legacy of 400*l.*, and thereout set apart the sum of 400*l.* given, in trust, for the purposes before mentioned, and invested the same on mortgage, at 5 per cent. The Defendant then stated, that the sum of 400*l.*, so invested, remained upon that security until about two years after the decease of *Edmund Buscall*, when the mortgage was paid off; and that the Defendant then invested the mortgage-money, in his own name, in the purchase of the sum of 410*l.* Navy five per cent. annuities; and that in the year 1813 or 1814, the Defendant sold out that stock, and did not afterwards invest the produce, but retained it in his own hands. The Defendant admitted that he received the interest on the mortgage, and the dividends on the sum of stock; he stated that certain payments had been made, by *Edmund Buscall* and by himself, to a brother of *John Buscall*, on his behalf, on account of the interest of the 400*l.*, the last of which payments was made on the

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1st of *March* 1801, and of which 16*l.* had been paid by *Edmund Buscall* and 40*l.* by himself; and that the dividends or interest received by him, (the Defendant,) amounted to 246*l.*; or thereabouts, and that, under the circumstances before mentioned, he had converted and applied only such part of such dividends or interest to his own use, as had not been paid over by him as therein-before stated. The Defendant also stated that he believed it was a fact, that *John Buscall* had never been heard of since the year 1800, except as having died at or about that time; and the Defendant admitted that he had never heard of him since that time. The Defendant stated that he had not been able to ascertain whether *John Buscall* attained the age of twenty-four years; but that he had been informed and believed that *Philip Buscall* died in the lifetime of *John Buscall*, and about the year 1797, and that *John Buscall* left *James Buscall* and the Plaintiffs surviving him. The Defendant, by his answer, also claimed, in bar of the suit, the same benefit of the statute of limitations, and of the laches of the Plaintiffs, in putting their claim in suit, as if he had pleaded the same in bar to the bill.

The Plaintiffs, after the filing of the original bill, procured letters of administration to *John Buscall* and to *James Buscall*; and, by supplemental bill, they stated these administrations, and insisted that all difficulty as to the time of the death of *John Buscall* was removed by their obtaining administration to him.

Affidavits were subsequently made, which tended to prove that *John Buscall* died in the month of *January* 1800, under the age of twenty-four; and which shewed that dividends to the amount of 392*l.* 3*s.* 2*d.*, would have accrued, between the year 1814 and the present time, upon the stock which had been sold out and upon the

the

the other stocks into which, if not so sold, it would have been converted.

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The Vice-Chancellor, upon motion, supported by these affidavits, ordered that the Defendant should transfer into the name of the Accountant-General, in trust in the cause, 430*l.* 10*s.* New 3½ per cent. annuities, being the amount which the sum of 410*l.* Navy 5 per cent. annuities, admitted by the Defendant's answer to have been sold out by him in the year 1813 or 1814, would have produced if the same had not been sold out by him, and had been standing in his name in the books of the Bank on the conversion of Navy 5 per cent. annuities into 4 per cent. annuities, and the subsequent conversion of the last mentioned annuities into New 3½ per cent. annuities; and that the Defendant should pay into the Bank, with the privity of the Accountant-General, to the credit of the cause, the sum of 598*l.* 3*s.* 2*d.* cash (*a*), subject to the further order of the Court.

The Defendant now moved that the Vice-Chancellor's order might be discharged.

Mr. *Wigram* and Mr. *Rogers*, in support of the motion.

The fortieth section of the recent statute of limitations (*b*) is a complete bar to the Plaintiffs' demand in this

(*a*) This amount was produced by adding the before-mentioned sum of 392*l.* 3*s.* 2*d.* to the sum of 206*l.*, which last was the amount admitted to have been received by the Defendant for dividends or interest, after deducting therefrom the sums which he alleged that he had paid on account of *John Buscall*.

(*b*) 3 & 4 *W.* 4. c. 27. This act is intituled, "An Act for the Limitation of Actions and Suits relating to Real Property; and for simplifying the Remedies for trying the Rights thereto." The fortieth section is in the following words:—"And be it further enacted, that after the said 31st day of *December* 1833, no action or suit, or other proceeding, shall

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this suit. It will be argued for the Plaintiffs, that this is not a suit for a legacy, but a suit to make the Defendant answerable, as a trustee. That argument, however, goes too far; for every executor is a trustee, and every suit for a legacy is a suit to compel the performance of a trust; and, if the argument were to prevail, the consequence would be, that there would be no case to which this part of the statute could apply, and the express provision which the legislature has made, would be entirely inoperative. *Murray v. The East India Company.* (a)

The LORD CHANCELLOR [without calling on Mr. Wakefield and Mr. Goodeve, who were counsel on the other side;]

A man, who, being in possession of a fund which he knows to be not his own, thinks proper to sell it and apply the produce to his own use, certainly does not come before the Court under circumstances which entitle him to much indulgence; and the only question is, whether, by the statute which has been referred to, I am prohibited from entertaining this suit to make him responsible for that breach of trust. The whole fallacy

be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless, in the mean time, some part of the principal money, or some interest thereon, shall have been paid, or some acknowledg-

ment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case, no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

(a) 5 B. & Ald. 204.

lacy of the Defendant's argument consists in treating this suit as a suit for a legacy. Now, the fund ceased to bear the character of a legacy, as soon as it assumed the character of a trust fund. Suppose the fund had been given by the will to any body else, as a trustee, and not to the executor; it would then be clearly the case of a breach of trust. In this case, the executor, when he severed the legacy from the general personal estate, could not pay it over to any other person; he was bound by the direction of the testator to hold it upon certain trusts until the legatee attained twenty-four. What he would have done by paying it to a trustee, he has done, by severing it from the testator's property, and appropriating it to the particular purpose pointed out by the will.

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It is impossible to consider that the executor, so acting, is acting as an executor: he has all this while been acting as a trustee.

This suit must be considered, not as a suit for a legacy, but as a suit to compel a party to account for a breach of trust; and it is clear, therefore, that it is not within the terms of the act in question.

Motion refused with costs. (a)

(a) There is room, perhaps, for considerable doubt, whether the act above referred to extends to any legacies which are not charged upon land. The title of the act relates solely to land; and so, apparently, do all its provisions, except the words in the fortieth section above cited, with respect to the recovery of legacies, and similar words in the forty-second section, with respect to the re-

covery of interest upon legacies, and a declaration in the forty-third section that no person claiming any tithes, legacy, or other property, which might be recovered at law or in equity, shall have a longer time to recover the same in any spiritual Court than he has at law or in equity.

See some observations upon the scope of the act, in *Paget v. Foley*, 2 Bing. N. S. 679.

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In the Matter of the LUDLOW Charities.

Mr. LECHMERE CHARLTON'S Case.

A Barrister, who was also a Member of Parliament, appeared before a Master, as counsel in support of a petition presented by himself and others; and he afterwards addressed a letter to the Master, which was expressed in threatening terms, and the tendency of which was to induce the Master to alter the opinion he was supposed to have formed upon the case; and he subsequently wrote a letter to the Lord Chancellor, in which he avowed the authorship of the letter to the Master. The Lord Chancellor committed him to the Fleet, during pleasure.

IN this case, two petitions had been presented to the Lord Chancellor, under the seventy-first section of the act 5 & 6 W. 4. c. 76, for the regulation of municipal corporations, praying that proper persons might be appointed trustees of certain charities at *Ludlow*: and by an order made by the Lord Chancellor upon both petitions, and bearing date the 20th of August 1836, it was referred to the Master in attendance during the vacation, to appoint proper persons to be trustees of the charity estates and property, late vested in or under the administration of the corporation of *Ludlow*, or any of the members thereof in that character, which were affected by the seventy-first section of the act of parliament.

Edmund Lechmere Charlton, Esquire, one of the Members of Parliament for the borough of *Ludlow*, and a barrister, was one of the petitioners by whom one of the petitions was presented; and in the prosecution of the order, he attended as counsel, on behalf of his co-petitioners and himself, before Master *Brougham*, who sat for the vacation Master. After some proceedings had been taken, both Master *Brougham* and Mr. *Charlton* left town, and Mr. *Charlton* subsequently addressed to Master *Brougham* the following letter:—

“*Ludford*, 24th October 1836.

“Sir,—I am informed by my solicitor, that the inclosed memoranda appear on the statement of facts submitted

submitted to you in the case of the *Ludlow* charities, which induced your clerk to say, that he believed that the trustees were appointed. Permit me to say, this is exceedingly unfair; nay more, it is practising a deception on me that is unwarrantable, and which entitles me to call on you for an explanation; in doing which, I hope I shall not exceed the limits that are allowed to a gentleman who feels himself to have been undeservedly aggrieved. As a mere barrister, advocating the cause of my clients, I question if I have any right to dispute, in this stage of the business, your authority, your law, or your decision, in a private communication, as there is another tribunal open to me for appeal; but, in the present case, I maintain that I am justified in adopting this mode of proceeding, because you have in these notes that are ascribed to you, either stated what is not true, or you have drawn conclusions from my statements and affidavits, which are at variance with the facts, and which, directly or indirectly, cast an imputation on my character as an advocate, or as a gentleman. First, with respect to the word 'settled,' I assert that the matter was not settled, and I have your authority for saying it was not settled. You told me, and I dare you to deny it, that if my reply would take up a long time, you must defer it; and you must recollect that it was only on this express understanding, that I refused to depart without having your permission to take out another warrant, which you allowed. With what propriety then, I ask, did you write the word 'settled?' But let me remind you of another circumstance. Mr. *Romilly* made a long speech to prove that the estate derived from *Edward* the Sixth was for 'corporate' as well as for 'charitable' purposes. Mr. *Downes* swore (* * * * *) that it was given for corporate purposes; but not a proof, or the semblance of proof, was in evidence in support of this
assertion

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assertion, save and except a single sentence in the report of the charity commissioners, which, so far from bearing out the assertion of Mr. *Downes* and the logic of Mr. *Romilly*, proves, if it proves anything, directly the reverse of what they would infer. Well, when Mr. *Romilly* had done, and proposed his pure disinterested squad for trustees, did you not say 'Let us first go into the question of the merits of the respective trustees proposed by each side; after which you' (addressing yourself to me) 'will have the opportunity of replying as to the proper disposal of the estate in question?' That reply I have never had; it was deferred at your own request, because you said you had no time to hear it, if it would take up much time. With what propriety or justice, then, do you say that the question at issue is 'settled?' And now to your other memoranda. You assign two reasons for not appointing any members of the old corporation, which, if they are intelligible, (and it is really with some difficulty that I make them out) are untrue. You say that the deeds, &c. were deposited in the *Ludlow* bank, under the advice of Mr. Serjeant *Merewether*, and that I admitted it to be true. I say I did no such thing. Read the report in the *Times* newspaper, the reporter of which was happily present to confirm the accuracy of my statements. Mr. Serjeant *Merewether* merely advised that the books and deeds which related to the charity property should not be given to the new council. It was the old corporation, in their capacity of trustees, that deposited the property confided to their care in that place that was most secure from any lawless violence that the rabble may attempt. You next refer to my affidavit as the ground on which you refuse to make any of the old corporators trustees, which is unfair and unjust towards me. My affidavit goes to prove that the old corporators, as trustees of the charity estate

estate under the Municipal Act, did no more than fulfil the trust reposed in them without fear or favour; and I defy you to point out a passage that impugns their past conduct or their eligibility for the future. I now come to your 'addition.' You assert that the old corporation are 'in contempt.' This is not true; and I need only recal to your recollection what passed, to satisfy you that it is not true. I stated that I was prepared in the first instance, to maintain, among other reasons to which I should advert, that they were not in contempt, because Mr. *Downes*, by adding what he had to your order without your permission, had weakened, if he had not destroyed, its effect. I stated that I had in my possession affidavits from the parties concerned, which they had left to my discretion to produce or not to produce as I thought fit; and I was proceeding in my argument, when Mr. *Romilly* interrupted me, and remarked he would pass the subject over for the present; in reply to which I said, I would not agree to such an arrangement; that is, that he should pass it over altogether, or he should then proceed with the charge. You then interposed and said, that it appeared better to pass it over altogether, as you understood that the business could proceed without the papers in question; and it was on this understanding, namely, that it should be passed over altogether, that the matter proceeded. With what propriety then, I ask, do you assert that the old corporation are 'in contempt'? It is, however, on these grounds that you say you have named none of the old corporators as the new trustees, when there is not a shadow of blame imputed to them in the affidavits; and in the inferences that you have drawn, you are wholly unsupported by facts. And who is it that you propose to appoint in their places? Every one of the persons recommended by the new council, to the number of ten, every one of the

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the persons supported by 'the well-beloved' hack of
 * * * * the Attorney-General, for party purposes; the
 majority of whom deny that the funds were given for
 charitable uses; the majority of whom have adopted
 every means that ingenuity could devise to prevent the
 rents from the charity estates being paid to the trustees;
 the majority of whom have used threats and menaces to
 procure the charity funds for their own benefit; the
 majority of whom have publicly declared that they only
 want these charity funds to pay off their own debts;
 the majority of whom, you yourself have in an authen-
 ticated paper declared, 'ought not to be appointed.'
 Yes! These are the persons that you have selected,
 together with seven others, (a palpable minority) to
 administer honestly and conscientiously the charity funds
 of this borough. These are the persons that you, as a
 wise and incorruptible Judge, presume to recommend
 for that important trust, giving the depredators (for so
 they are if they attempt to purloin the charity funds for
 their own benefit) a majority of ten to seven, when you
 will remember, and I dare you to deny it, that after I
 had urged the same argument against the council having
 any thing to do with these funds that I have now, that
 you yourself admitted that they were improper persons,
 and you asked me if I would be satisfied if you gave to
 the petitioners a majority over the council, in order to
 prevent such misapplication of the charity money that
 I anticipated. Such conduct, Sir, may be becoming
 enough in Master *Brummagem*, but in Master *Brougham*
 it is as unexpected as it is inexcusable. In order to
 make out something like a case to justify you, you have,
 if I am to understand that this decision of yours is con-
 clusive, and is to be reported to the Chancellor, thrown
 all the blame on me, to which I will not submit. Far
 be it, however, from me to throw out, in this stage of the
 business, a threat to you in your capacity of a Judge. I
 have

have too much respect for that high office, when it is held, as it ought to be, for the protection of its suitors, to be unmindful of my duty. All I ask is, that there should be a rehearing, and that you should set yourself right where you have been led into error. All I ask, in short, is, even-handed justice, in which case this letter shall never be made public, nor shall your serenity be again disturbed by any further remonstrance from

“ Your obedient and very humble servant,

“ *E. L. Charlton.*

“ *P. S.* — I shall be in *London* on the first day of term, and shall wait for your answer at *Fendall's Hotel, Palace-yard.*

“ *To Wm. Brougham, Esq.*”

The following are the inclosures to which the foregoing letter refers.

“ Copy of notes written on the state of facts : —

‘ Settled.

‘ Stated and admitted to be true, that the corporation being in debt to the *Ludlow Bank*, and feeling doubtful whether they ought to hand over the deeds and securities belonging to the corporation to the new council, deposited, under the advice of Serjeant *Merewether*, with the bank, who now claim a lien upon them ; and also that there were important questions pending between the old trustees and the present town council. See also affidavit of Mr. *Charlton* respecting money borrowed by the late trustees from the same bankers, with whom deeds deposited : I think this makes it improper to appoint them new trustees. In addition to the objection to appoint any of the old trustees arising out of the above admission of Mr. *Charlton*, who appeared before me as counsel for the petitioners, *Sankey* and others, and also from what appears in the affidavit

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of Mr. *Charlton*, it is to be observed, that the said petitioners are in contempt, inasmuch as they have refused to comply with my order to produce before me the deeds, books, papers, and writings relating to the estates and property of the charity in question; I am therefore of opinion that in this case none of the old trustees ought to be appointed, and have accordingly selected some other names from the list proposed by the said petitioners, *Sankey* and others.

30th Sept. 1836.

(Signed) ' *W. Brougham.*'' *W. Edwards.**Wm. Felton.**J. Hutchens.**Wm. Jennings.**J. Smith.**H. Salway.**Wm. Tinson.**Sir E. Thomason.**Geo. Hooper.**J. G. Clay.**Joseph Sawyer.**Geo. Wellings.**Richard Marshall.**Jos. Cooper.**Richard Jones.**Thomas Childe.**Rd. Baugh.*

' The above seventeen names approved, subject to consent.

' 30th Sept. 1836.

(Signed) *W. B.*'

' *Ludlow.* — Stated that the estates under *Edward* the Sixth's Charity are solely for charitable purposes. Query whether, the corporation contending that this is corporate property, it is safe to appoint them? Assuming that the whole is applicable to charity, the present corporation ought not to be appointed.

' *Richard Marston.**Sir E. Thomason.**Richard Jones.**J. G. Clay.**Geo. Wellings.**Jos. Cooper.'**Thomas Childe.*

" The above is not written on the state of facts, but on a separate sheet of paper; but to it there is neither the name

name nor the initials of Mr. *Brougham*, so that it stands for nothing."

1836.

 Mr. LECHMER &
 CHARLTON'S
 Case.

At the sitting of the Court, on *Monday* the 7th of *November*, *The LORD CHANCELLOR* said,

Nov. 7.

I feel it my duty to state an occurrence in the office of one of the Masters of the Court, to which I have seen no parallel in the course of above thirty years' experience.

Master *Brougham* has put into my hands a letter received from a gentleman, who describes himself as a barrister, and as having attended the Master upon a reference made by an order of this Court. I abstain, at present, from mentioning the name of the gentleman to whom I have alluded; but I think it right to say it is not the name of any gentleman whom I am accustomed to see practising in this Court. The letter states the proceedings in the Master's Office; and, after complaining of an opinion which the Master is supposed to have formed—not stating any report, but, on the contrary, that the case is still pending—and after using expressions in the letter which no gentleman could permit to be used towards himself, and proceeding in terms which I at present abstain from characterising, and throwing out insinuations of the most calumnious nature, concludes with a direct threat, the object of which is to induce the Master to alter the opinion he was supposed to have formed, and to come to a conclusion favourable to the case advocated by the writer of the letter; and the writer then adds, that he shall be in *London* on the first day of term, and shall wait for the Master's answer at the place which he mentions.

1896.

 Mr. LUCHMERE
 CHARLTON'S
 Case.

It is quite obvious what course the Master should have pursued. He should have referred the letter at once to the Court. It appears, however, that the Master adopted a course which I cannot approve. He put the letter into the hands of a friend. That friend doubted whether he could permit the matter to proceed in a hostile manner, and consulted with another gentleman of high rank and character. They both agreed that it was impossible the matter should proceed in that course, and that the Master could not treat it as a personal quarrel; but that it being a letter, addressed to him in the exercise of his judicial functions, it should be referred to me. It is impossible not to disapprove of the course the Master took in the first instance: for it is quite obvious, that if the Masters are to take up such matters as personal quarrels, not only do they put themselves at the mercy of those who might wish to attain their ends by any means, but there may arise an influence of a private or personal nature, which cannot but interfere materially with the due administration of the law; and I, therefore, entirely approve of the advice which the Master has received, to place the case before the Court.

It remains for me to consider what course I ought to adopt. It is obvious, that if the Masters are not to consider matters of this kind in the light of personal quarrels, it is the duty of the Court to throw its protection round them. What I have said, however, has been necessarily said in the absence of the party whose name was subscribed to the letter; and, indeed, I have no judicial knowledge that it was written by him.

A case of this nature has never occurred within my knowledge. It has often occurred that letters have been improperly addressed to Judges, sometimes from
 ignorance,

ignorance, and sometimes from improper motives, with reference to matters pending before them; but never before, that I have known, in such insulting language, and in absolute threats. In all those cases, the practice has been adopted, of handing over the letter to the opposite side. I propose, therefore, in this instance, to direct, that as many copies should be made of this letter as there were parties before the Master upon the inquiry in question, and that each party should be furnished with a copy. The course which the parties may take, may render it unnecessary for me to adopt any further measures. Let the further consideration of this matter be adjourned to *Saturday* next.

1836.

 Mr. LECHMERE
 CHARLTON'S
 Case.

On the 9th of *November* 1836, Mr. *Lechmere Charlton* addressed the following letter to the Lord Chancellor:—

“ *Fendall's Hotel, Palace Yard,*
 9th Nov. 1836.

“ My Lord,

“ By the report in the *Times* newspaper of yesterday, of the proceedings in Chancery on the preceding day, I am given to understand that your Lordship says that you have ‘no legal knowledge’ that a certain letter of the 24th of *October*, signed with my name, and dated from my residence, to Master *Brougham*, respecting his conduct in the matter of the charity trusts of *Ludlow*, was written by me. I am uncertain, therefore, whether this letter will throw any additional light on the subject; but the motive I have in writing it is, to avow the authorship, and to say, with all becoming respect, that I shall not shrink from the responsibility.

1836.

Mr. LECHMERRE
CHARLTON'S
Case.

“ The letter was written some time ago, and I came to town on the first day of term, for the express purpose of receiving Master *Brougham*'s answer; and if Master *Brougham* had been such a Judge as your Lordship would make out, I am inclined to think that he might have contrived to have been in *London* at the period when the Judges invariably assemble (instead of arriving near a week afterwards), particularly when he had such weighty matters before him; a circumstance which I should hardly notice, if it did not forcibly point out, that, though he is a Master in Chancery, he is, from his own want of punctuality, and from the reprehensible manner in which he preserves order in his own Court (to which I shall take another opportunity of adverting) barely entitled to that respect and dignity which ought, in my humble opinion, to be devoted invariably to the solemn functions of a judge.

“ I may remark, too, in passing, that though I do not presume to question your Lordship's extensive power, I do presume to assert that it has a limit beyond which your Lordship dare not force it; and in so important a question as this, which affects the liberty of a *British* subject, and the independence of the *British* bar, I venture to dispute the ground-work of your authority; that is, whether your Lordship had the right, under the Municipal Act, to send the appointment of trustees to the Master at all (and, if I am not misinformed, such was your Lordship's opinion once) and against which I, in the first instance, protested before the Master.

“ The words of the act, I believe, are (I quote from memory) that, ‘in such case,’ that is, if parliament did not otherwise provide, before the 1st day of *August* 1836, ‘the Lord High Chancellor should have power to make such orders for the administration of the funds as
he

he shall see fit.' Not a syllable is said of the appointment of new trustees, but, on the contrary, the context clearly indicates that it was the intention of the legislature to continue the old trustees, subject to your Lordship's orders, in whom, and in whom only, the legal estate is now vested. If, by these half dozen words, it was meant to vest all the trust estates in the kingdom in the Lord Chancellor, it surely would have been alluded to in the preamble of the bill; but I ask pardon for presuming to discuss this point with your Lordship, which I should not venture to do if it was not in reference to what I shall subsequently advert, and if I was not informed that every gentleman of any eminence at the Chancery bar is of my opinion. But to proceed: Your Lordship says, that 'for above thirty years' experience' you never knew an instance of this kind; possibly not. But before your Lordship imputes crime to the singularity of the circumstance, I would venture to ask your Lordship, if, in 'above thirty years' experience,' you ever knew a person, who called himself a judge, and who shelters himself under the purity of the judicial mantle, to have been guilty of the practices with which Master *Brougham* stands charged by me, and of which I have unquestionable proof?

1836.

 MR. LECHMER
 CHARLTON'S
 CASE.

"The point in issue, my Lord, I humbly but fearlessly maintain, is, whether Master *Brougham* has misconducted himself or not; and if he has, whether my letter is such as to deserve imprisonment, with which your Lordship indirectly threatens me: that is the question.

"If I do not generally practise in your Lordship's, nor in any other court, I am not, I presume, on that account, the less entitled to the protection that a coun-

1836.

Mr. LECHE
CHARLTON'S
Case.

sel has a right to demand in behalf of justice and his clients; and, to put an hypothetical case, I would ask your Lordship, if a judge (a recorder for instance) in some inferior court, imputed to counsel what was notoriously untrue, and forfeited his word to him in a most inexcusable manner, in order to give a judgment for sinister purposes, what, I ask, is to become of the boasted independence of the *British* bar, if the counsel, thus insulted, tricked and defeated, is not to be allowed to complain of the deception that has been practised upon him, in the manner that one gentleman usually complains of the ill treatment that he has received from another, without being hoisted up for contempt of a superior court, and an upright and enlightened judge?

“My Lord, I repeat that I have put this case hypothetically. In the defence of my own conduct, it would ill become me to charge Master *Brougham* with sinister purposes; yet I must be permitted to say, that I humbly conceive that party purposes are, in a court of justice, sinister purposes; and, in justice to my constituents, I must add, that I shall now, I fear, be reluctantly compelled, in consequence of what has taken place, to institute an inquiry into the decisions of the Master on the meeting of Parliament, not only in the *Ludlow* case, but in others.

“I shall feel myself called upon, too, my Lord, in justice to my own character, to repel the animadversions that your Lordship has cast upon my conduct, from the judicial chair in the High Court of Equity. My Lord, I contend that I preferred no calumnious insinuations against Master *Brougham*. I have witnesses of the highest respectability to confirm the truth of every word that I wrote. I contend, too, that I made no use
of

of a 'threat' in the manner in which your Lordship has introduced it. In brief, my Lord, I claim for myself the most disinterested and the most creditable conduct, as a counsel, a member of parliament, and a man, which I defy your Lordship to controvert or impugn. My sole object was to see the charity funds of the borough, that I have the honour to represent, administered for charity purposes only, for which they were originally given. I cared not by whom, so that they were not entrusted to a set of persons who denied that the estate was a charity estate, and, denying it, made no secret that, if they could get possession of it, they would devote the funds for the town fund, and who, since the case was before the Master, have positively commenced an action against the charity trustees for part of the property in question. Was this conduct of mine criminal?

1836.

 Mr. LECHMER
 CHARLTON'S
 CASE.

"The truth is, my Lord, and I will not conceal the fact, that I suspected, and not without reason, towards the close of the last session of Parliament, that a portion of his Majesty's government were attempting to convert the charity funds throughout the kingdom to party and political purposes, which I did not then hesitate to avow, and I was resolved to watch them very narrowly. Circumstances that will probably be made public in due time were brought under my notice, which tended strongly to confirm my suspicions; but it was not till I heard that a certain legal functionary that had been very active in these charity concerns, had given it as his opinion that there could be no appeal from the Master's decision, which would be therefore necessarily final, that my fears were more strongly excited, and my attention more immediately called to the conduct of the Master in every case brought before him. It is not my

1836.

Mr. LECHMERE
CHARLTON'S
Case.

business now to say what that conduct has been; I shall confine myself to the part that I acted. Being perfectly well acquainted with the subject of the charities belonging to *Ludlow*, which I have more than once prevented the misapplication of, I resolved to accept the brief that the petitioners offered to me, and appear as counsel in the cause. I had certain misgivings from what I heard and saw, which will be given fully when I come to speak of the gross irregularity, not to say indecency, that prevailed in the Master's court, and therefore I was determined to be very particular in my own observations, and to be equally attentive to those of the Master; two only of which I will allude to now. The first was, that the Master said that the council would be very improper persons for trustees; the other was a distinct and positive promise to grant me an opportunity of reply before he settled who the new trustees should be; scarcely, however, were these words uttered, scarcely had the breath escaped his lips, than Master *Brougham* gave judgment in the teeth of his own words, by selecting the very persons that he acknowledged would be improper, and instead of keeping his word to me, he left London, and gave his clerk an order to draw up the report, as the case was 'settled;' nor was this all.

"Now I ask your Lordship, I ask any man of honour, what he would have done under these irritating circumstances, but write to Master *Brougham*, and attempt to obtain the fulfilment of his pledges, which as a man of honour and a gentleman, he was bound to perform. If I wrote stronger than might have been expected, let me beg you to look at the motive I had at heart, the disappointment that I had experienced as a counsel, the injustice to my clients and constituents, the suspicions that

that had been excited, the trick that I had been played, from all which there was no appeal. The sole object that I had, and this I solemnly affirm, was to give Master *Brougham* an opportunity of setting himself right where he had been led into error, and to remind him of the pledges he had made and forgotten, which I expected he would readily correct; and if my letter was, as your Lordship asserts, for the purpose 'of obtaining the ends of the writer,' it was because the ends of the writer were those of justice and of truth, and were such as the Master himself had in effect pledged himself to support! 'This is the head and front of my offending;' and when I say that through life I have been the ardent opposer of abuses, let me find them where I would, and in *Ludlow* particularly, I have spent large sums, incurred great obloquy, and quarrelled with intimate friends, for this sole, and, in my opinion, meritorious purpose, I must say that I think that the aspersions which your Lordship has thrown out against me are unnecessarily harsh and undeserved.

1836.

Mr. LECHMERE
CHARLTON'S
Case.

"Towards Master *Brougham* I freely declare that I harbour no sort of ill-will; it is of his judicial conduct alone that I complained, and which I hoped would have been corrected. If I had been in any way misinformed respecting the accuracy of his notes, or if, in my zeal for the object that I had at heart, I had done anything unbecoming a man of honour, or lowered, in the slightest degree, the high functions of the judicial character, which it has been the object of my life to venerate and uphold, I should have been willing to make any atonement that a gentleman can; but if, on the contrary, I have, by my conduct, attempted to preserve the dignity and sanctity of the office, by resisting, as became me, the abuse of power, I glory in what I have done, and will willingly brave your Lordship's authority

1836.

Mr. LECHMERE
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Case.

authority before I will retract or apologise for a syllable that I have written.

"I have, &c.

"E. L. Charlton.

"The Lord High Chancellor,
&c. &c. &c."

Nov. 12.

On *Saturday*, the 12th of *November*, Mr. *Maule* stated, on the part of the corporation of *Ludlow*, who had been furnished, in pursuance of the Lord Chancellor's order, with a copy of Mr. *Lechmere Charlton's* letter to the Master, that they were content to leave the matter in his Lordship's hands.

The LORD CHANCELLOR then said, that he had now received an answer from one of the parties to whom he had directed a communication to be made, but that a letter had just been put into his hands from another party, to whom he had directed a similar communication to be made, and that party stated that he had not yet received instructions from his clients in the country. His Lordship said he was, therefore, under the necessity of postponing the matter until *Tuesday* morning. His Lordship then added: —

A case not very dissimilar to the present, at least raising the principle, occurred before Lord *Hardwicke*. In that case a letter was sent by a party addressed to the Lord Chancellor, inclosing a 20*l.* note; and the course which his Lordship took, on that occasion, was to make an order *nisi* upon the party, to shew cause why he should not stand committed. (a) There can, therefore, be no difficulty, in point of form, in bringing

(a) *Martin's case*. See 2 *Russ. & Mylne*, 674. note.

bringing this matter under the cognizance of the Court; but I have serious doubts whether, considering the magnitude of the offence, that would be an adequate proceeding. My present impression is that it will be my duty to put this matter in a course of further investigation.

1886.

 MR. LECHMERE
 CHARLTON'S
 Case.

On *Monday* the 14th of *November* 1886, the LORD CHANCELLOR mentioned in Court that he had received a letter, addressed to himself, and bearing the same signature as that which was attached to the letter to Master *Brougham*; and that his Lordship would follow the course which had been adopted with respect to the former letter, and communicate copies of this letter also to the respective parties. The letter here referred to by his Lordship, was the letter of the 9th of *November*, which has been already stated.

Nov. 14.

On *Tuesday* the 15th of *November* 1886, the LORD CHANCELLOR stated that he had received the answers of all the parties who had been furnished with copies of the letters, and that they declined taking any proceedings upon the subject. His Lordship also stated that the signatures of the two letters had now been verified by affidavit; and that the course which he intended to pursue was in conformity with that taken by Lord *Hardwicke*, in the case to which he had already referred, and also with the course adopted by the Court of Exchequer, in the case of a letter sent to a Judge of that Court. (a) His Lordship desired that the order might be in the form of the order made by Lord *Hardwicke*, and that it should require Mr. *Charlton* to shew cause why he should not be committed to the *Fleet*,
 and

Nov. 15.

(a) See the case of *James Macgill*, 2 Fowl. Esch. Pract. 474.

1836.

 MR. LECHMERE
 CHARLTON'S
 CASE.

and should direct him personally to attend the Court. The order was accordingly made in the following terms: —

“ The Right Honourable the Lord High Chancellor of *Great Britain* this day taking notice in open Court that *William Brougham*, Esquire, one of the Masters of this Court, had received a letter, directed to him the said Master, dated ‘*Ludford, 24th October 1836,*’ and signed ‘*E. L. Charlton,*’ containing matter scandalous with respect to the said Master, and an attempt improperly to influence his conduct in the matter pending before him; and that his Lordship had received a letter, addressed to himself, dated ‘*Fendall’s Hotel, Palace Yard, 9th November 1836,*’ and signed ‘*E. L. Charlton,*’ acknowledging that he the said *E. L. Charlton* was the writer of the said letter dated the 24th of *October 1836*; and also the affidavit of *Joseph Parkes*, proving the said two letters to be of the handwriting of *Edmund Lechmere Charlton*, being read, his Lordship, upon taking the said matter into consideration, and deeming the conduct of the said *Edmund Lechmere Charlton* therein a contempt of this Court, doth think fit, and so order, that the said *Edmund Lechmere Charlton*, having personal notice hereof, do shew cause unto this Court, the 22d day of *November* instant, why he should not stand committed to the prison of the *Fleet* for his said contempt; and that he do then personally attend this Court.”

Nov. 22.

On *Tuesday* the 22d of *November 1836*, the Lord Chancellor said that he had received a certificate from the officer of the Court, stating, that after making diligent search for *Mr. Charlton*, in order to serve him with the order of the 15th instant, he had been unable to find him.

His

His Lordship added, that the next step was to substitute other service for personal service, and that the time for Mr. *Charlton's* attendance must be enlarged to *Saturday* next. The following order was then made:—


1836.

 Mr. LECHMERE
 CHARLTON'S
 Case.

“Whereas by an order, dated the 15th day of *November* 1836, stating that the Right Honourable the Lord Chancellor of *Great Britain*, taking notice in open Court that *William Brougham*, Esquire, one of the Masters of this Court, had received a letter, directed to him the said Master, dated ‘*Ludford*, 24th *October*, 1836,’ and signed ‘*E. L. Charlton*,’ containing matter scandalous with respect to the said Master, and an attempt improperly to influence his conduct in the matter pending before him; and that his Lordship had received a letter addressed to himself, dated *Fendall's Hotel*, *Palace Yard*, 9th *November* 1836, and signed ‘*E. L. Charlton*,’ acknowledging that the said *E. L. Charlton* was the writer of the said letter dated the 24th of *October* 1836; and also the affidavit of *Joseph Parkes*, proving the said two letters to be of the handwriting of *Edmund Lechmere Charlton*, being then read, his Lordship, upon taking the said matter into consideration, and deeming the conduct of the said *Edmund Lechmere Charlton* therein a contempt of this Court, did think fit to order that the said *Edmund Lechmere Charlton* (having personal notice of the said order) should shew cause unto this Court, on the 22d day of *November* instant, why he should not stand committed to the prison of the *Fleet* for his said contempt, and that he should then personally attend this Court:

“And it now appearing by the affidavit of *William Pell*, deputy messenger of this Court, that he had made diligent search for the said *Edmund Lechmere Charlton*, in order to effect personal service of the said order,
 but

1836.


MR. LECHMERE
CHARLTON'S
Case.

but had not been able to find him, and verily believed that the said *Edmund Lechmere Charlton* was purposely keeping out of the way to avoid personal service of the said order, and the said order and the said affidavit being now read :

“ His Lordship doth order that the time for the appearance of the said *Edmund Lechmere Charlton*, pursuant to the said order, dated the 15th day of *November* instant, be enlarged until *Friday* next the 25th instant, and that the said *Edmund Lechmere Charlton* do then attend to shew cause unto this Court why he should not stand committed to the prison of the *Fleet* for his said contempt. And his Lordship doth order that service of this order, by leaving copies thereof at *Fendall's* Hotel, in *Palace Yard, Westminster*, and at *Ludford*, in the county of *Hereford*, and also by service of a copy thereof on *Robert H. Baines*, the solicitor who appeared on behalf of the said *Edmund Lechmere Charlton* before the said Master (*Mr. Brougham*), be deemed good service on the said *Edmund Lechmere Charlton*.”

Nov. 25.

At the sitting of the Court on *Friday* the 25th of *November*, the Registrar having, by the Lord Chancellor's order, called on “ the Matter of the *Ludlow Charities* ” three successive times, and no person appearing,

The LORD CHANCELLOR spoke as follows : —

This was the day on which, by my order, *Mr. Lechmere Charlton* was to shew cause why he should not be committed to the *Fleet*. The case having been three times called, and *Mr. Lechmere Charlton* not appearing, the order for his commitment would be made of course ; but the case is so important that I shall state
all

all the circumstances, and also the grounds upon which I proceed.

1836.

Mr. LECHMERE
CHARLTON'S
Case.

It appears that in one of the usual references made to appoint trustees of the *Ludlow* charities, there were two petitions, and that in one of the petitions Mr. *Lechmere Charlton* was a petitioner, together with other persons of the highest possible respectability. Some proceedings were taken upon that reference in the Master's Office; and Mr. *Lechmere Charlton*, as appears from his own letters, appeared as counsel for that set of petitioners of whom he was himself one. The Master, after hearing the matter discussed at full length, was under the necessity of leaving town; and Mr. *Lechmere Charlton* subsequently obtained from the Master's clerk, a paper containing private memoranda of the Master of what had taken place. These memoranda he annexes to one of his letters. I state these memoranda before I read the letter. They are described in the letter as "copy of notes written on the state of facts." [His Lordship then read the memoranda.] The letter adds with respect to the last memorandum, "The above is not written on the state of facts, but on a separate sheet of paper; but to it there is neither the name nor the initials of Mr. *Brougham*, so that it stands for nothing."

The first letter is dated *Ludford*, October 24th 1836. It is addressed to the Master and signed "*E. L. Charlton*." [His Lordship then read the letter at length, and proceeded.] The Master having communicated this letter to me, I thought it my duty to take notice of it in Court; and some few days afterwards, I myself received the following letter, dated "*Fendall's Hotel*, 9th November, signed "*E. L. Charlton*" and addressed to me.

[His

1836.

Mr. LECHMERE
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Case.

[His Lordship then read this second letter throughout; observing, by the way, that the supposition alluded to, of what His Lordship's opinion had once been, was totally without foundation. His Lordship afterwards proceeded as follows : —]

The first order which I made upon the subject of these letters, was an order *nisi* that Mr. *Lechmere Charlton* should shew cause why he should not be committed to the *Fleet*; and, as usual, that was an order which required personal service. The last occasion on which I had occasion to notice this, was the day on which the time given by the order *nisi* expired. It appeared then, by affidavit, that Mr. *Charlton* could not be found for the purpose of serving him with the order. [His Lordship read the affidavit to that effect.]

Upon this affidavit shewing that personal service could not be effected, and stating that *Pell* the messenger believed that Mr. *Lechmere Charlton* was keeping out of the way to avoid personal service, I made an order, substituting service at *Fendall's* Hotel, at Mr. *Lechmere Charlton's* residence at *Ludford*, and on Mr. *Baines* his solicitor; and the time was enlarged to this day. I have now the affidavits of all those three services having been properly performed.

It is quite unnecessary to advert to the letters themselves. Every gentleman, at all acquainted with the proceedings in this Court, must obviously see that they contain a most gross and aggravated contempt of Court; a gross contempt in the first instance, and very much aggravated by the letter to myself, which is not only itself a contempt of Court, but it shews that after the
writer's

writer's attention had been called to the expressions used in his letter to the Master, and after he had had time for reflection, he had deliberately determined to adhere to the terms of that letter: and he added, in his letter to me, expressions which were, in themselves, a serious contempt of this Court.

1836.

 MR. LECHMERE
 CHARLTON'S
 CASE.

The power of committal is given to courts of justice, for the purpose of securing the better and more secure administration of justice. Every writing, letter, or publication which has for its object to divert the course of justice is a contempt of the Court. It is for that reason that publications of proceedings which have already taken place, when made with a view of influencing the ultimate result of the cause, have been deemed contempts. It would be strange, indeed, if the Judges of the court were the only persons not protected from libels, writings, and proceedings, the direct object of which is to pervert the course of justice. Every insult offered to a Judge, in the exercise of the duties of his office, is a contempt; but when the writing or publication proceeds farther, and when, not by inference, but by plain and direct language, a threat is used, the object of which is to induce a judicial officer to depart from the course of his judicial duty, and to adopt a course he would not otherwise pursue, it is a contempt of the very highest order. The writer of these letters supposes Master *Brougham* to have finally made his report, and that from that report there was no appeal; and the avowed object of the letter to the Master, is to induce him to alter his decision in the absence of the opposite party, by holding out threats, and concluding by saying, that if the Master would depart from the decision to which he was supposed to have come, and come to one directly opposite, then that letter should never be made public, and the Master should not be disturbed by any further

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remonstrance from the writer. This is intelligible language, which no one can misunderstand.

In the letter to myself, Mr. *Lechmere Charlton* tells me that there is a limit beyond which I dare not exercise my authority, and implies, that I dare not exercise my authority with reference to himself. I take less notice, however, of the letter to myself than of the letter to the Master; but I have read it, for the purpose of shewing that, up to the time at which it was written, the writer adhered to the threats contained in his former letter.

Having thus stated the case, I will now refer to the authorities which relate to the subject. With one exception, I shall state those only which are found in print. I have been furnished with several others, but as they are not in print, I abstain from mentioning more than one of them. In *Pool v. Sacheverel (a)*, a party in a suit published an advertisement, offering a reward of 100*l.* to any person who should discover and legally prove that two persons, who appeared by the *Fleet* register to have been married, on a certain day, by certain names, were then married, and that before and at the time of the marriage, they were really called and known by those respective names. The party submitted to the Court, and the Court said it believed that there was no evil intention; but, as the act had a tendency to produce false evidence, and as the justice of the Court and of the nation was concerned, the party must, in justice, and for example's sake, stand committed.

In an anonymous case before Lord *Hardwicke (b)*, a person who had published an advertisement, relating to

(a) 1 *P. Wms.* 675.

(b) 2 *Ves. sen.* 520.

to the answer put in by a Defendant in a suit in this Court, was committed; and the reason stated was that it had a tendency to prepossess people as to the proceedings. In *Roach v. Garvan* (a), the printer of a newspaper was committed for publishing a report of the proceedings in a cause, accompanied by observations calculated to prejudice the public against the parties concerned, before the cause was finally heard.

1836.

 Mr. LECHMERE
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The next case, in point of date, is one before Lord *Hardwicke* in 1747, which is to be found in the Registrar's Book (b), and which, in its circumstances, is very similar to the present. In that case, a person, named *Thomas Martin*, of *Great Yarmouth* in *Norfolk*, having written a letter to Lord *Hardwicke*, mentioning that a bill in Chancery was threatened to be filed against him, and enclosing a bank note for 20*l.*, of which he desired his Lordship's acceptance, he was ordered to shew cause why he should not be committed; and afterwards, in consideration of his submission to the Court, and asking pardon, and of his being at the time mayor of *Yarmouth*, and as the public business might suffer by his imprisonment, he was discharged, upon payment of the costs; and the bank note was ordered to be applied to the relief of prisoners in the *Fleet*. There was also a case, very similar in circumstances, before the Court of Exchequer in 1748, concerning *James Macgill* (c), committed to prison for writing a letter to the Chief Baron, containing a scandalous offer to his Lordship relating to the judgment to be given in a cause then depending in that Court, and other scandalous matter. A case came before Lord *Erskine*, in which the jurisdiction of this Court,

in

(a) 2 *Atk.* 469. *S. C.* 2 *Dick.*
 794.

(b) And see now 2 *Russ.* &
Myline, 674. n.

(c) 2 *Fowl. Exch. Pract.* 474.

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in matters of this sort was very much discussed, viz., *Ex parte Jones*. (a) There, a pamphlet was published, dedicated to the Lord Chancellor, reflecting upon the conduct of persons who were acting, under orders of the Court, in the management of the affairs of a lunatic; and the author and printer of the pamphlet were committed to the *Fleet*. In giving judgment, Lord *Erskine* observed, that "it never had been or could be denied that a publication, not only with an obvious tendency, but with the design, to obstruct the ordinary course of justice, was a very high contempt;" and that the object was "to procure a different species of judgment from that which would be administered in the ordinary course, and, by flattering the Judge, to taint the source of justice."

All these authorities tend to the same point; they shew that it is immaterial what measures are adopted, if the object is to taint the source of justice, and to obtain a result of legal proceedings different from that which would follow in the ordinary course. It is a contempt of the highest order: and although such a foolish attempt as this cannot be supposed to have any effect, it is obvious that if such cases were not punished, the most serious consequences might follow. If I consulted my own personal feelings upon the subject, I should pass by these letters as a foolish attempt at undue influence; but if I were to adopt that course, I should consider myself guilty of a very great dereliction of my high duty. The order must therefore be made absolute for the committal of Mr. *Lechmere Charlton* to the *Fleet*.

The following order was then made.

"Whereas

(a) 13 *Ves.* 237.

"Whereas by an order dated the 15th day of *November* instant, stating that the Right Honourable the Lord High Chancellor of *Great Britain*, taking notice in open Court that *William Brougham* Esquire, one of the Masters of this Court, had received a letter directed to him the said Master, dated *Ludford* 24th *October* 1836, and signed '*E. L. Charlton*,' containing matter scandalous with respect to the said Master, and an attempt improperly to influence his conduct in the matter pending before him; and that his Lordship had received a letter, addressed to himself dated '*Fendall's Hotel, Palace Yard, 9th November* 1836,' and signed '*E. L. Charlton*,' acknowledging that the said *E. L. Charlton* was the writer of the said letter dated the 24th *October* 1836; and that the affidavit of *Joseph Parkes*, proving the said two letters to be of the handwriting of *Edmund Lechmere Charlton* were then read; and that his Lordship upon taking the said matter into consideration, deemed the conduct of the said *E. L. Charlton* therein a contempt of this Court; — it was ordered that the said *Edmund Lechmere Charlton* (having personal notice thereof) should shew cause unto this Court on the 22d day of *November* instant, why he should not stand committed to the prison of the *Fleet* for his said contempt, and that he should then personally attend this Court. And whereas by an order dated the 22d of *November* instant, it was ordered that the time for the appearance of the said *Edmund Lechmere Charlton*, pursuant to the said order dated the 15th *November* instant, should be enlarged until this day, and that the said *Edmund Lechmere Charlton* should then attend to shew cause why he should not stand committed to the prison of the *Fleet* for his said contempt; and it was ordered, that service of that order, by leaving copies thereof at *Fendall's Hotel*, in *Palace Yard, Westminster*, and at *Ludford*, in the county of *Hereford*, and also by service of a copy

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thereof on *Robert H. Baines*, the solicitor who appeared on behalf of the said *Edmund Lechmere Charlton* before the said Master (Mr. *Brougham*) should be deemed good service on the said *Edmund Lechmere Charlton*; and the said *Edmund Lechmere Charlton* not attending this Court this day, pursuant to the said order dated the 22d day of *November*, although he hath been duly served with the said order, as by the affidavit of *William Pell* and the affidavit of *William Davies*, now produced and read, appears; and no cause being shewn to the contrary during the sitting of this Court, his Lordship doth order that the said *Edmund Lechmere Charlton* do stand committed to his Majesty's prison of the *Fleet* for his contempt.

Nov. 26.

The Lord Chancellor, on the 26th of *November*, issued a warrant, addressed to the Warden of the *Fleet* prison, or his deputy attending the Court of Chancery, which, after reciting the order of the 25th of *November*, required him to search for and apprehend Mr. *Charlton*, and carry him to the *Fleet* prison, there to remain until the Lord Chancellor's further order.

Mr. *Lechmere Charlton* evaded the execution of the warrant, until the 3d of *February* 1837, when he was taken, and conveyed to the *Fleet*. In the mean time, however, Parliament met on the 31st of *January*, and the Lord Chancellor, on that day, addressed the following letter to the Speaker:—

“ 31st *January* 1837.

“ Mr. Speaker,

“ I have the honour of making known to you, for the information of the House of Commons, that I issued my warrant on the 26th of *November* last, for the commitment

mitment of *Edmund Lechmere Charlton*, Esq., one of the Members for the borough of *Ludlow*, for a contempt of the High Court of Chancery, in writing and sending a certain letter, dated the 24th of *October* last, to *William Brougham*, Esq., one of the Masters of the Court; which was followed by a certain other letter, dated the 9th of *November* last, addressed to myself. I have thought it right to make this communication, for the purpose of accounting for the probable absence of the Honourable Member, and of testifying my profound respect for the Honourable House.

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“ I have the honour to be, Sir,
“ Your most obedient servant,
“ *Cottenham.*”

On the same day *Mr. Charlton* wrote to the Speaker, as follows: —

“ *Fendall's Hotel, Palace Yard,*
“ 31st *January* 1837.

“ Sir,

“ I have just reason to believe that *Mr. William Pell* (who is a messenger in the Court of Chancery) and others employed by him, are determined, under the directions of the Lord Chancellor, to interrupt me in my progress to the House of Commons this day, and I humbly request, therefore, as I am thereby deterred from attending, that you will vouchsafe to extend to me your protection.

“ I seek not to withdraw myself from the criminal jurisdiction of the realm, well knowing that privilege of Parliament, which is allowed in cases of public service for the commonwealth, must not be used to the danger of the commonwealth.

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"To be protected, however, from 'any violence of the Crown or its ministers,' is, I apprehend, the established and undoubted privilege of a Member of Parliament. To this hour, I know not of what I am accused, except from public report; but, nevertheless, I ask for no more than to be allowed, without molestation, to take my seat, that I may state what I do know of the matter to the House, and then bow, with respect, to their decision, be it what it may.

"I have the honour to be, Sir,

"Your obedient humble servant,

"*E. L. Charlton.*

"To the Right Honourable
The Speaker."

On the 1st of *February*, a Committee of Privileges was appointed by the House of Commons, by whom the letters to the Speaker from the Lord Chancellor and Mr. *Lechmere Charlton* were referred to the Committee.

On the 3d of *February*, Mr. *Charlton*, having been apprehended, sent the following letter to the Speaker:—

"Sir,

"I have the honour to inform you, that persons stating that they have a warrant from the Lord Chancellor, have forced their way into the house in which I am staying, and have compelled me to go to the *Fleet* prison with them.

"I had flattered myself that while the matter was under the consideration of a Committee of Privileges, such violent proceedings as these would have been avoided; but I am sorry to say I am mistaken.

"I have

"I have only to add that I hope you will be so good as to read this letter to the House, and that they will extend to me the privilege that under similar cases has been given to members of parliament.

"I have, &c.

"*E. L. Charlton.*

"*Friday evening, half past five o'clock.*

"To the Right Honourable the Speaker."

On the 16th of *February*, the Committee, after having examined *Mr. Leckmere Charlton*, and several witnesses, made the following report to the House: —

"In reporting upon the question which has been referred to your Committee, they propose to follow the course which usually has been adopted upon such occasions, of first stating the circumstances of the particular case, and afterwards the law and usages of Parliament as it appears to apply to them.

"The warrant for *Mr. Charlton's* commitment to the *Fleet*, and the order of Court on which it was founded, were produced to the Committee, and it appeared that he was committed by the Lord Chancellor for writing a letter, addressed to *William Brougham*, Esquire, one of the Masters of the High Court of Chancery, containing matter scandalous with respect to the said Master, and an attempt improperly to influence his conduct in the matter pending before him, 'which the said Lord Chancellor deemed to be a contempt of the Court of Chancery.' The order not proceeding to set forth the letter in question, or to specify the parts of it on which these charges were grounded, your Committee therefore directed the letter to be produced, inasmuch as they considered, that although the Lord Chancellor had the power to declare what he deemed

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to be a contempt of the High Court of Chancery, it was necessary that the House of Commons, as the sole and exclusive judge of its own privileges, should be informed of the particulars of the contempt, before they could decide whether the contempt was of such a character as would justify the imprisonment of a member. They also summoned Mr. *Charlton* before them, and afforded him an opportunity of fully stating his case.

“Upon the whole examination, the letter appears to your Committee to be expressed in an intemperate and improper manner. The letter, however, was occasioned by information derived from the solicitor in the cause, the correctness of which Mr. *Charlton* had no reason to doubt; but they are of opinion that it is offensive to the Master, and thereby to the authority of the Court under which he acted, and was an attempt improperly to influence his conduct in the matter pending before him, with a view to obtain a further hearing, to which, if applied for in a proper manner, Mr. *Charlton* would have been entitled.

“It was found, in the course of the investigation, that Mr. *Joseph Parkes*, the solicitor for the parties who appeared before the Master in opposition to Mr. *Charlton*'s clients, had, during the interval which occurred between the issue of the warrant and its execution, written a letter, at the request of a third person, containing the following assurance, ‘Mr. *Charlton* may take my honour, and I have never yet violated it, that he is perfectly secure in coming to my house to see if we can adjust the *Ludlow* matters,’ and that Mr. *Charlton* did afterwards, in consequence, attend a meeting at the house of Mr. *Parkes*, without any interruption, or attempt to execute the warrant by the officers

officers who held it. Your Committee therefore felt it necessary to ascertain whether the execution of a process issued on the ground of punishing a contempt of the Court of Chancery, had in any manner been allowed to be enforced or suspended at the discretion of one of the litigant parties, or to be rendered subservient to his objects. This inquiry has tended considerably to lengthen their proceedings, but the result has satisfied them that no power had ever been given by any person, or exercised by the solicitor for that purpose.

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“ Upon the law and usage of Parliament, as affecting this case, your Committee beg leave to refer to the statement contained in the report of the Committee of Privileges on the case of the Honourable *William Long Wellesley*, presented to the House on the 26th of *July* 1831, the precedents cited in which they will not here repeat.

“ The Committee are deeply impressed with the difficulty and importance of the question referred to them, in the absence of authorities to which they can refer as clearly in point and directly bearing on this particular case. It will be seen, from the early cases, that the ancient definition of privilege of Parliament, is, that it belongs to every Member of the House, except in cases of treason, felony, or refusing to give surety of the peace. These exceptions, by the statement of the Commons in 1641, are further extended to all indictable offences; by their resolution in 1697, to forcible entries and detainers; and, in 1763, in conformity with the principle of the declaration of 1641, and of a subsequent resolution in 1675, to printing and publishing seditious libels; to which may be added the resolution of the Lords in 1757, that privilege shall not protect Peers against process to enforce the *habeas corpus*.

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"The ordinary process for contempts against persons having privilege of Parliament or of peerage, has not been that of attachment of the person, but that of sequestration of the whole property, which has been found sufficient to vindicate the authority of the Courts, even in cases of some aggravation.

"It is stated by *Blackstone*, that 'contempts committed even by Peers, when enormous and accompanied with violence, such as forcible rescous and the like, or when they import disobedience to the King's writs of prohibition, *habeas corpus*, and the rest, are punishable by attachment;' and the same doctrine has, on different occasions, been expressed by other writers, and by judges of high authority.

"The only cases, however, in which attachments have been found by the Committee to have been actually issued against privileged persons, are that of Earl *Ferrers*, by the King's Bench, and that of Mr. *Long Wellesley*, by the Court of Chancery, already referred to. The former was a case of disobedience to a writ of *habeas corpus*, to which, while the discussion was pending, it had been declared, by the House of Lords, privilege of Parliament did not extend; the other was that of the forcible removal of a ward of the Court of Chancery, and placing her out of the jurisdiction of the Court, which obviously could only be checked by the most prompt and efficacious remedy.

"Since the sitting of the last Committee of Privileges, the act of 2 & 3 W. 4. c. 93., intituled, 'An act for enforcing the Process upon Contempts in the Courts Ecclesiastical of *England* and *Ireland*,' has passed, by which contempts of the ecclesiastical courts, 'in face of the Court, or any other contempt towards such Court, or the

the process thereof, are directed to be signified to the Lord Chancellor, who is to issue a writ *de contumace capiendo*, for taking into custody persons charged with such contempt,' in case such person 'shall not be a Peer, Lord of Parliament, or Member of the House of Commons.'

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" Under all the circumstances of the case, your committee are of opinion, that Mr. *Charlton's* claim to be discharged from imprisonment, by reason of privilege of Parliament, ought not to be admitted.

" 16th February 1837."

On the 17th of *February*, Sir *Charles Wetherell*, on behalf of Mr. *Charlton*, informed the Lord Chancellor of the decision of the Committee of Privileges, and applied to his Lordship for an order for Mr. *Charlton's* appearance at the rising of the Court. The Lord Chancellor said, that the matter must be brought before him by petition in the usual way.

Feb. 17.

On *Saturday* the 18th of *February* 1837, Mr. *Charlton* presented a petition to the Lord Chancellor, stating that neither the order of the 25th of *November*, nor the orders of the 15th and 22d of *November* were ever personally served upon him, and that he was induced to abstain from appearing in Court, in pursuance of those orders, from the consideration that it was his duty, as a Member of the Legislature, so to do, and that he should otherwise compromise the privileges of the Members of the House of Commons, and not from any feeling of disrespect entertained by him towards the Court, and that he was actuated by the same motives in avoiding the execution of the warrant until the meeting of Parliament. The petition then stated the report of

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of the Committee of Privileges, and went on to state, that the petitioner's object, in addressing the letter to the Master, was solely with the view of obtaining from him a further hearing of the matter, and that he had no intention of expressing himself offensively towards the Master, or of endeavouring to influence his conduct in the matter pending before him, or of bringing into contempt the authority of the Court; and that, although he was betrayed into intemperate and improper expressions towards the Master, they arose entirely from an anxiety on his part to protect the interests of the persons on whose behalf he appeared before the Master, and which, from the information he had received, he had every reason to believe had not been properly attended to; and that the petitioner regretted, and was sorry for having made use of any expressions which could be considered as offensive to the Master or disrespectful towards the Court. The petition prayed that the petitioner might be forthwith discharged out of custody.

Sir *Charles Wetherell*, who appeared in support of the petition, took occasion to say, that if he had been consulted by Mr. *Charlton* at the proper time, he should have advised him to dispute the validity of the order, by raising the question, whether the Lord Chancellor had power to delegate to the Master the appointment of new trustees under the Municipal Corporations Regulation Act; and whether, consequently, the letter written to the Master was a contempt of the Court.

The LORD CHANCELLOR.

When I felt it my duty to issue the order for the commitment of Mr. *Charlton*, in *November* last, I said, what I am sure those who know me will give me credit for,

for, that nothing but a sense of public duty induced me to issue that order. Nothing which had taken place before that time, or which has passed since, could possibly influence my feelings with regard to the most important duty which I had to perform.

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The order amounted to my judicial decision as to the effect of Mr. *Charlton's* letter to the Master, namely, that it contained "matter scandalous, with respect to the Master, and an attempt improperly to influence his conduct in the matter pending before him." I have no judicial knowledge of what has taken place in the House of Commons; but Mr. *Charlton* has, in his petition, stated that the Committee of that House has found that the letter was offensive to the Master, and, therefore, to the authority of the Court under which he acted, and was an attempt improperly to influence his conduct in the matter pending before him, with a view to obtain a further hearing, to which, if applied for in a proper manner, he would have been entitled; and that, under all the circumstances of the case, he was not entitled to be discharged by reason of privilege.

The writing matter scandalous with respect to the Master is, comparatively, an immaterial part of the offence. That part of the offence which I thought it my bounden duty to visit with punishment was, the attempt improperly to influence the conduct of the Master in the matter pending before him. A greater offence than a person's attempt, by private communication, without the knowledge of those to whom he is opposed, to influence, by private feelings, the conduct of any one invested with the duty of judicially disposing of matters pending in this Court, cannot well be stated. Mr. *Charlton* describes himself as a Member of the House of Commons; but, what is more important, he describes

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describes himself as a barrister; a person, therefore, who, from the situation in which he is placed, and the education he must have received, could not have been ignorant of the effect of the letter which he himself had written.

Under these circumstances, after taking every possible precaution that the order should not be issued till after he had had full opportunity of appearing to vindicate himself, or to dispute the jurisdiction of the Court, or to state any subject of mitigation which he might have to allege, the order was finally issued in the month of *November* last. From that time, until the day mentioned in his petition, the process of the Court was not made effectual against him; although the warrant was in the hands of the officer of the Court, and I have no reason to doubt that that officer performed his duty, and used all diligence in executing that warrant. Mr. *Charlton* states that neither the order of the 25th of *November* last, nor the orders of the 15th and 22d of *November* were personally served on him; and that he was induced to abstain from appearing, in pursuance of such orders, from the consideration that it was his duty, as a Member of the Legislature, to do so, and that he should otherwise have compromised the privileges of the Members of the House of Commons, and not from any feeling of disrespect entertained by him towards the Court; and that he was actuated by the same motives in evading the execution of the warrant till the meeting of Parliament.

Mr. *Charlton*, as a Member of the House of Commons and as a barrister, must very well have known that no longer ago than the year 1831 a case (a) occurred

(a) Mr. *Long Wellesley's Case*; now reported, 2 *Russ. & Mylne*, 639.

curred, which involved a question precisely similar to the present; it was matter of discussion in this Court, and of inquiry in the House of Commons, and it led to the same result as has followed the investigation in this case, namely, the resolution of a Committee of Privileges, that, for contempts of this Court, the House of Commons, most properly, do not consider a member of their House as privileged. By contempt of this Court, I mean that species of contempt of which the party was guilty in the case in 1831, and of which *Mr. Charlton* has been adjudged guilty in this case. Of the law of Parliament and the law of this Court, therefore, *Mr. Charlton*, educated as he must have been, and filling the situation in which he was placed, could not possibly have been ignorant. He states, not that he had no knowledge of the orders which had been made, but that he did not surrender to the process; in short, that he abstained from appearing, and that he evaded the process of the Court. Then he adopts the course of ascertaining what a Committee of Privileges would do in his favour; and that course has ended in the way stated in his petition. He states that the inquiry of that Committee terminated on the 16th of *February*, that is, on *Thursday* last; so that up to *Thursday* last, as he himself states, he was disputing and resisting the jurisdiction of this Court. In custody, it is true, he was, from some day in the week before last, but up to the report of the Committee, on the 16th of this present month of *February*, he was disputing the jurisdiction of this Court. Yesterday Sir *Charles Wetherell* made an application, which was informal, and which, therefore, of course, could not at that time be attended to; so that the petitioner, on the very day after he finds himself compelled to submit to the jurisdiction of this Court, thinks the Court is to discharge him. It would be making a mere mockery of the process of the Court,

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if, for so grave an offence as this, a party is to have his discharge by merely asking for it.

That, however, is not the principal ground on which I feel myself bound to adopt the course I am about to pursue. My order adjudged *Mr. Charlton* to be guilty of an attempt improperly to influence the conduct of the Master in the matter pending before him. The Court will not discharge a party guilty of contempt, unless he submits. I do not say the imprisonment is to be perpetual, or that the Court will not exercise a sound discretion; but a party who comes here to be discharged from custody, at the earliest possible period at which he could be so discharged, is, at least, expected to come before the Court with an expression of repentance for what has passed, and that sort of statement which will induce the Court to hope such an offence will not be repeated by him, and will justify the Court in acting with lenity towards the individual, and prevent the jurisdiction of the Court being subject to similar offences in future.

Mr. Charlton entirely omits in his petition any expression of regret for that which is the principal feature of the offence, namely, his having attempted improperly to influence the Master's conduct in the matters pending before him. That he was guilty of such an attempt, is the construction which I have judicially put on his letter, and which he has never come here to dispute. And although *Sir Charles Wetherell* has made some observations for the purpose of shewing that the order ought not to have issued, yet he properly observed, that this was not the time when those observations could be pressed, because the present application is not made for the purpose of discharging the order, as having been improperly issued; but the party, submitting
or

or professing to submit to the order, applies to be discharged, on the ground that sufficient punishment has followed the offence on which judgment has been pronounced by the order which has been so issued.

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I say nothing as to the time which may be considered as the proper period for the expiation of the offence which has been committed. Bound as I am to protect the administration of justice in this Court, and bound, therefore, to hold out to all parties who have any transactions in this Court, that they cannot with impunity be guilty of that offence for which, by my order, this gentleman has been committed to prison, I should feel I was not doing my duty, if, on such a petition, I should order his discharge. If he came before me with a petition differently expressed, and treating the matter in a mode very different from that in which he has treated it in this petition, I say nothing as to the time when I might feel myself justified in ordering his discharge; but I am bound to vindicate the authority of the Court; and, therefore, to take care that a party who offends against its jurisdiction and its dignity, is not to be discharged on the mere asking for it, without even having the grace to acknowledge the offence of which he has been adjudged to be convicted; but yet, without calling in question the propriety of the order, or disputing the judgment so passed upon him.

I wish it to be understood that I say nothing as to the time. If the time had been much longer than it is at present, the language of this petition, and the submission found in it, are not such as this Court has a right to expect.

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Feb. 24.

Another petition was afterwards presented by Mr. *Charlton*, which was couched in precisely the same terms as his former petition, down to and including the statements of the report of the Committee of Privileges; but in which the petitioner added, that his object in addressing the letter to the Master, was solely with the view of obtaining from him a further hearing of the matter; and that this motive arose entirely from an anxiety on his part to protect the interests of the persons on whose behalf he appeared before the Master, and which, from the information he had received, he had every reason to believe, had not been properly attended to; and that he regretted and was sorry that under such feelings, and without any intention to commit a contempt of the Court, he should have written and sent a letter to the Master which had been adjudged by the Lord Chancellor to contain matter scandalous with respect to the Master, and an attempt improperly to influence his conduct or judgment in the matter pending before him; or which, in its tenor or language, might be considered as offensive to the Master, or disrespectful to the Court; and that the regret so expressed by the present petition was intended, by the petitioner, to be the import of the expressions set forth in the petition lately presented by him. The petitioner concluded by praying that he might be forthwith discharged.


Sir *C. Wetherell*, in support of the petition.

The LORD CHANCELLOR.

The ground of the order for commitment has been questioned, neither by any application to shew cause against the order, which, in the first place, was an order *nisi*, nor by any application to discharge it by reason of its having proceeded on a mistaken or unfounded ground; and Mr. *Charlton* states that another tri-

bunal,

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bunal, with which this Court has no connexion, but before which he states that his case has been investigated, has also come to the same conclusion as to the nature and character of that letter. Mr. *Charlton*, in the petition which he presented last week, confined his contrition to that which constitutes the smallest part of the offence, namely, having used expressions offensive to the Master and disrespectful to the Court; thus challenging, in his petition, the main ground on which the order for his commitment proceeded, namely, his having attempted, by writing the letter, to influence the conduct of the Master. This Court will never permit the propriety of its orders to be in that way questioned. If a party chooses to come before the Court for the purpose of drawing in question the propriety of an order, he must do it in the regular form; but while he is a prisoner, for having violated his duty towards the Court, and committed a contempt, the Court will not permit him to challenge the authority of the Court or dispute the grounds of the commitment: that is not the mode in which the Court will permit a complaint to be made of its proceedings. Mr. *Charlton* has now been in prison nearly a week beyond the time when that petition was before me, and he has now varied the grounds on which he asks for his discharge. He says that his object in addressing the letter to the Master was solely with a view of obtaining from him a further hearing of the matter, and that that motive arose entirely from an anxiety on his part to protect the interests of the persons on whose behalf he appeared before the Master, and which, from the information he had received, he had every reason to believe had not been properly attended to. Now, it is not inconsistent with these terms, that the object was to obtain a rehearing, and that the object of the rehearing was to induce the Master to come to a decision directly the reverse of

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that to which, as appears by that letter, the writer of it supposed the Master to have come. The petition then states that the petitioner regrets, and is sorry that, under such feelings — and, not without any intention to induce the Master to alter his opinion — but without an intention to commit a contempt of the Court, he should have written and sent a letter to the Master which has been adjudged by the Court to contain matter scandalous with respect to the Master, and an attempt improperly to influence his conduct or judgment in the matter pending before him, or which, in its tenor or language, might be considered as offensive to the Master, or disrespectful to the Court.

Now I do not find in the language of this petition any thing which, directly, at least, challenges the authority of the Court, or the propriety of the order which the Court issued. The petitioner says that his object was to obtain a rehearing; but it is quite clear that his object, in obtaining that rehearing, was to induce the Master to come to a decision contrary to that to which the writer supposed he had come. He says the act was done without an intention to commit a contempt of the Court; but it is not denied that it was done with an intention to induce the Master, by threats and intimidation, to come to a decision contrary to that which the petitioner supposed he had expressed.

I do not find that this petition contains that challenge of the authority of the Court, or of the propriety of the order, which is found in the former petition; and although the Court might have had reason to expect a more ample submission than that which is found in this petition, yet I do not think it inconsistent with my duty to receive this petition as an expression of contrition for the offence which the petitioner has committed.

I, therefore,

I, therefore, now order the discharge of Mr. *Charlton*. He has been in prison three weeks; and I feel satisfied that what has taken place will convince all persons that no station, no rank in life, no position in which the party may stand before this Court, will justify or enable any person to commit a similar offence with impunity.

I now make the order for Mr. *Charlton's* discharge in the usual way.

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Mr. LECHMERE
CHARLTON'S
Case.

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April 6, 7, 8.

RICHARD BEVAN the younger, being indebted to his father, *Richard Bevan* the elder, in the sum of 1000*l.*, gave to his father a bond in the penal sum of 2000*l.*, dated the 22d of *April* 1797, and conditioned to be void upon payment of the sum of 1000*l.* with interest at 5 per cent. *Richard Bevan* the elder being, at a subsequent period, indebted to Lord *Vernon*, in the sum of 500*l.*, prevailed upon his son, *Richard Bevan* the younger, to join him, as his surety, in a bond to Lord *Vernon* in the penal sum of 1000*l.*, dated the

A son, being indebted to his father upon a bond for 1000*l.* and interest, subsequently joined his father, as surety, in a bond for 500*l.* and interest, given by the father to a third person; and a memorandum was then indorsed upon the bond for 1000*l.*, by which it was agreed between the father and son that the son should not be called on to pay the within mentioned principal sum of 1000*l.* until the father should have paid all principal money and interest, due on the bond for 500*l.*: Held, that this indorsement did not affect the interest accruing due upon the bond for 1000*l.*, and therefore that, after the deaths of the father and son, the personal representative of the father might file a bill against the real and personal representatives of the son, praying for immediate payment of the interest on the bond for 1000*l.*, and for payment of the principal, when the principal and interest on the bond for 500*l.* should have been paid.

A surety who compounds a debt for which his principal and himself have become jointly liable, and takes an assignment of that debt to a trustee for himself, can only claim, against his principal, the amount which he has actually paid.

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the 24th of *August* 1801, and conditioned to be void upon payment of 500*l.* and interest. Upon that occasion, the following indorsement was made upon the bond for 1000*l.*, and signed by both father and son:—
“Whereas the within bounden *Richard Bevan* hath, on the 24th of *August* 1801, become jointly and severally bound, in a certain bond or writing obligatory, to the Right Honorable Lord *Vernon*, in the penal sum of 1000*l.*, conditioned for the payment of 500*l.* with interest; and whereas the said sum of 500*l.* is the proper debt of the said *Richard Bevan* the elder, and the said *Richard Bevan* the younger is the surety of the said *Richard Bevan* the elder: it is, in consideration thereof, agreed, that the said *Richard Bevan* the younger shall not be called upon to pay the within mentioned principal sum of 1000*l.*, until the said *Richard Bevan* the elder shall have paid and satisfied all principal money and interest due on the said bond so given to Lord *Vernon*, and delivered the said bond, cancelled, to the said *Richard Bevan* the younger; as witness our hands this 24th of *August* 1801.”

Richard Bevan the younger, by his will, dated the 13th of *March* 1806, devised all his real estates to his wife, *Elizabeth Bevan*, for life, and, after her death, to the heirs of his body; but for want of such issue, or if such issue, if any, should die under the age of twenty-one years, he gave the same to *Elizabeth Drayton Smith* and the heirs of her body; and he appointed his wife his executrix, and gave her all his personal estate. By a codicil, he devised certain after-purchased real estate to his wife for life, and after her decease, to *Elizabeth Drayton Smith* and the heirs of her body. He died, without issue, on the 1st of *January* 1815, and his wife proved his will. She died on the 23d of *December* 1828, having appointed *John Norris* her executor, who subsequently

sequently proved her will, and thus became the personal representative of *Richard Bevan* the younger. After the death of *Elizabeth Bevan*, *Elizabeth Drayton Smith* entered into possession of the real estates devised by *Richard Bevan* the younger, and barred the estate tail.

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In the meantime, *Richard Bevan* the elder died on the 8th of *February* 1818; having, by his will, appointed *John Bevan* and *Thomas Davies* his executors. *Thomas Davies* died in his lifetime, and *John Bevan* renounced probate; and letters of administration, with the will annexed, were subsequently granted to the Plaintiff, *Richard Bevan Reed*.

In the month of *July* 1826, *R. B. Reed*, as legal personal representative of *Richard Bevan* the elder, commenced an action against *Elizabeth Bevan*, as administratrix of *Richard Bevan* the younger, on the bond for 1000*l.*; whereupon, *Elizabeth Bevan* filed a bill in Chancery against *R. B. Reed*, praying an injunction, and an account of the dealings and transactions between *Richard Bevan* the elder, and *Richard Bevan* the younger, and praying also a declaration that, in taking such account, she (*Elizabeth Bevan*) ought not to be debited with the amount of the bond for 1000*l.*, unless and until *R. B. Reed* should have paid the bond for 500*l.*; and that in case she should be obliged to pay any sum in respect of such last-mentioned bond, the same might be charged in the account against *R. B. Reed*; and that *R. B. Reed*, if he should admit assets of *Richard Bevan* the elder, might pay her what should be found due to her, on taking such account, she being ready and willing to pay whatever should be found due to him. Shortly after the filing of this bill, *Elizabeth Bevan* obtained, upon affidavit, and upon notice, an injunction, dated the 9th
of

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of *August* 1826, to restrain *R. B. Reed* from all proceedings in the action already brought by him upon the bond for 1000*l.*, and from commencing any other action touching the matters mentioned in *Elizabeth Bevan's* bill. That injunction was never dissolved, and *R. B. Reed* never put in any answer to the bill.

On the 19th of *January* 1828, the personal representatives of Lord *Vernon* filed a bill in Chancery against *R. B. Reed* and *Elizabeth Bevan*, as the personal representatives of *R. Bevan* the elder and *R. Bevan* the younger, respectively, stating the bond for 500*l.*, and praying the usual accounts of the personal estate of *R. Bevan* the elder and *R. Bevan* the younger, and praying payment of what was due to Lord *Vernon's* estate for principal and interest upon that bond. This last-mentioned suit, having become abated by *Elizabeth Bevan's* death, was afterwards revived against *John Norris* as her personal representative, and subsequently came on to be heard, on the 22d of *June* 1830, before the Master of the Rolls, when a decree was made, declaring that the Plaintiffs, as executors of Lord *Vernon*, were creditors, by the bond of 1801, of *R. Bevan* the elder and *R. Bevan* the younger, for the sum of 500*l.* and interest from the 24th of *August* 1813; and directing that the usual accounts should be taken of the personal estate of *R. Bevan* the elder and *R. Bevan* the younger; and that their personal estates should be applied in payment of their debts and funeral expenses, and that the residue should be paid into the Bank, in trust in the cause. *John Norris*, who did not appear to have himself received any part of the personal estate of *R. Bevan* the younger, nevertheless, passed his accounts under this decree, and paid into Court the balance reported to be due from him, being the amount which *Elizabeth Bevan* had received in her life time. *R. B. Reed* also passed his

his accounts, but he did not pay in the balance reported to be due from him; and part of that balance was afterwards levied by means of a sequestration against him. *R. B. Reed*, as the administrator of *R. Bevan* the elder, with the will annexed, carried in, under that decree, a charge of the sum of 1000*l.* and interest, as being due from the estate of *R. Bevan* the younger, to the estate of *R. Bevan* the elder; but the Master disallowed the charge, and his report was afterwards absolutely confirmed, no exception having been taken to it. The whole of the personal estate paid into Court under the last-mentioned decree, was absorbed in payment of costs; and Lord *Vernon's* executors then filed a supplemental bill, for the purpose of making the real estates of *R. Bevan* the elder and *R. Bevan* the younger answerable for the amount due upon the bond for 500*l.*

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On the 20th of *August* 1834, the original bill in the present suit was filed by *R. B. Reed* against *John Norris* and *Elizabeth Drayton Smith*, charging that a sum of 1400*l.* and upwards was due, for interest alone, upon the bond for 1000*l.*; and that if such interest were paid, the Plaintiff would be able to satisfy what was due to the executors of Lord *Vernon* in respect of the bond for 500*l.*, and that the Plaintiff was entitled to have such interest paid, and to have the principal paid, when the other debt should have been satisfied. The bill prayed an account and payment of the interest due on the bond for 1000*l.*; and that, upon the bond for 500*l.* being paid or satisfied, the principal of the bond for 1000*l.* might also be paid.

After the answers to this bill had been put in, an indenture, dated the 5th of *September* 1835, was made between the surviving executors of Lord *Vernon* of the first part, the representative of a deceased executor of the second part, *John Norris* and *Elizabeth D. Smith* of the

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the third part, and *Henry Jeremy* of the fourth part; by which, after reciting that the sum of 949*l.* 6*s.* 1*d.* was due for principal and interest upon the bond for 500*l.*; and that the sum of 198*l.* 6*s.* 6*d.*, or thereabouts, was claimed by the executors of Lord *Vernon* for costs incurred in their suit, beyond the costs already paid; and reciting that Lord *Vernon's* executors had contracted and agreed with *John Norris* and *Elizabeth D. Smith* for the absolute sale to them of the bond debt of 500*l.*, and of all interest then due or thereafter to become due in respect thereof, and of all benefit and advantage which might thenceforth be derived from the suit instituted by them, for enforcing payment of the principal sum of 500*l.* and interest, and the further costs so incurred as before mentioned, and all further costs of the suit, with full power to prosecute such suit, at the price or sum of 600*l.*, which had been agreed to be advanced in the following proportions, viz., 400*l.* by *John Norris*, and 200*l.* by *Elizabeth D. Smith*; it was witnessed, that in consideration of the sum of 600*l.* paid by *John Norris* and *Elizabeth D. Smith* in the proportions before mentioned, Lord *Vernon's* executors bargained, sold, and assigned to *Henry Jeremy*, the bond debt or principal sum of 500*l.*, so due as before mentioned, and also certain sums therein mentioned to be due for interest, amounting to 449*l.* 6*s.* 1*d.*, and all other interest then due and thereafter to grow due; and all costs then due to the assignors, or which they might claim in respect of their suit, and all benefit of that suit; to hold the same in trust for *John Norris* and *Elizabeth D. Smith* as tenants in common, in the same proportions as those in which the purchase money of 600*l.* had been contributed by them as before mentioned; and Lord *Vernon's* executors constituted *H. Jeremy*, *John Norris* and *Elizabeth D. Smith*, jointly and severally, their attornies and attorney, for the recovery of the sums assigned.

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The Plaintiff, *R. B. Reed*, then filed a supplemental bill against *Norris, Elizabeth D. Smith*, and *Jeremy*, stating this assignment, and stating also that *John Norris* and *Elizabeth D. Smith*, alleged that much more than the sum of 600*l.* was due for principal and interest upon the bond for 500*l.*, and that they were entitled to stand in the place of Lord *Vernon's* executors, and to be paid out of the estate of *R. Bevan* the elder, the whole amount which could have been recovered by Lord *Vernon's* executors; but the supplemental bill charged that at the time of that transaction, they were sureties, to the extent of their assets from the estate of *R. Bevan* the younger, for the bond debt of 500*l.* and interest, and that, regard being had to the equities between the two estates, they were entitled only to be indemnified against that bond, and that they would be fully indemnified, if they should be allowed to retain, out of their debt to the plaintiff, what they should have paid to Lord *Vernon's* executors; and that they must in equity be deemed to have purchased the bond debt for the benefit of the joint estate of *R. Bevan* the elder and *R. Bevan* the younger, or for one of such estates, and that they were only entitled, as against the estate of *R. Bevan* the elder, or the assets of *R. Bevan* the younger, to claim the sum they had actually paid.

The supplemental bill prayed, that inquiries might, if necessary, be directed to ascertain what sum or sums of money had been paid by *John Norris* and *Elizabeth D. Smith*, or either of them, to Lord *Vernon's* executors in satisfaction of the bond for 500*l.*, and that it might be declared that the Defendants were not entitled, as against the Plaintiff, or as against the estate either of *R. Bevan* the elder, or of *R. Bevan* the younger, to be allowed, in respect of the bond for 500*l.*, more than they had so paid to Lord *Vernon's* executors, and that they might be

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be allowed such sum accordingly, in the accounts prayed for by the original bill, out of the interest, or, if that should not be sufficient, then, as to the deficiency, out of the principal, of the bond for 1000*l.*, and that what should remain of such interest and principal might then be paid to the Plaintiff, out of the assets of *R. Bevan* the younger.

The answers of the Defendants *Norris* and *Smith* to this supplemental bill, submitted that they were entitled to stand in the place of Lord *Vernon*'s executors, and to have, against the estate of *R. Bevan* the elder, the same right to be paid or allowed the whole principal and interest due on the bond for 500*l.*, and all costs of suit, as Lord *Vernon*'s executors would have had, in case the assignment had not been made; and further, that the estate of *R. Bevan* the elder ought to make good to the estate of *R. Bevan* the younger, all costs which had been incurred by that estate, in the suit of Lord *Vernon*'s executors, and all costs which might be incurred by that estate or by the Defendants *Norris* and *Smith* in respect of the bond for 500*l.* and interest.

The original and supplemental causes now came on to be heard.

Mr. *Wigram* and Mr. *Teed*, for the Plaintiff, contended that the agreement, endorsed upon the bond for 1000*l.*, related only to the principal sum secured by that bond, and not to the interest; and they opposed the right of the Defendants *Norris* and *Smith*, to claim against the estate of *R. Bevan* the elder, in respect of the bond for 500*l.*, a larger sum than they had actually paid. They contended also that a surety, who pays a bond debt of the principal obligor, becomes only a simple contract creditor of that obligor; and they cited *Ex parte*

parte Rushforth (a), Butcher v. Churchill (b), and Copis v. Middleton. (c)

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Mr. *Wakefield* and Mr. *Lovat*, for the Defendant *John Norris*.

Upon the true construction of the endorsement on the bond for 1000*l.*, it must be held, that neither principal nor interest was to be demanded until the bond for 500*l.* should have been paid; but not only does not the original bill in this cause state that the bond for 500*l.* has been paid, but, it does not even contain an offer to pay it; and the Plaintiff therefore had no right to institute this suit. In the suit instituted by *Elizabeth Bevan*, in the year 1826, for the purpose of restraining proceedings upon the bond for 1000*l.* until the bond for 500*l.* should have been paid, the Court, by the injunction which was then granted to restrain all proceedings whatever, has already put a construction upon the endorsement; and no attempt has ever been made to have that injunction dissolved, or to have its terms qualified, or to have provision made for payment of the interest, to the Plaintiff, or into Court. He never even put in his answer, although the bill charged that the agreement between the father and son was, that the son should not be called on to pay anything whatever upon the bond for 1000*l.* until the bond for 500*l.* should have been satisfied.

The Defendants *Norris* and Miss *Smith* purchased the debt due to Lord *Vernon's* executors on the bond for 500*l.*, with their own proper monies. They did not make that purchase as sureties. *Norris* never stood in any fiduciary relation to *Richard Bevan* the younger. He

(a) 10 *Ves.* 409.; see p. 420.

(c) *Turn. & Russ.* 224.

(b) 14 *Ves.* 567.

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He merely became, by operation of law, his legal personal representative, because he was the executor of *Elizabeth Bevan*. No personal estate of *R. Bevan* the younger ever came to his hands, and all that which came to the hands of *Elizabeth Bevan*, and was unapplied by her in her lifetime, has been paid into Court by *Norris*, as her executor. But even if they were to be considered as standing in the place of *R. Bevan* the younger, and as having purchased the bond debt as sureties for *R. Bevan* the elder, that character would not prevent their purchasing the debt upon the same terms and with the same rights as any other person. The principal debtor does not place the surety in the situation of a trustee for him. The transaction between them and Lord *Vernon's* executors was not, as in *Copis v. Middleton*, (a) a payment, discharge, and satisfaction of the bond, but a sale of the bond debt; and they are therefore entitled to stand in exactly the same situation as that in which Lord *Vernon's* executors would have stood, if the bond debt had not been sold.

Mr. *Richards* and Mr. *Puller*, for the Defendant *Elizabeth Drayton Smith*.

The Plaintiff had no right to file the original bill; for the condition of paying the 500*l.* bond had not then been performed: and even if it could be now said, that the bond for 500*l.* has been paid since the original bill was filed, that circumstance would not entitle the Plaintiff to a decree; *King v. Tullock*. (b) The case would even then be only like that of a mortgagee filing a bill of foreclosure before the mortgage had become absolute.

(a) *Turn. & Russ.* 224.; and *Hodgson v. Shaw*, 3 *Myline & Keen*, 183. see *Jones v. Davids*, 4 *Russ.* 277.;

(b) 2 *Sim.* 469.

lute. But the condition has not yet been performed, for the 500*l.* bond has not yet been cancelled.

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If an incumbrancer pays off a prior incumbrance at less than the full amount, and takes an assignment of that prior incumbrance, he has the same title to claim the full amount against the estate, as the person whose charge he has paid off; and what difference is there between such a case, and the purchase, by a surety, of the debt of his principal? There are cases, certainly, in which a person standing in a fiduciary character cannot purchase; but it is impossible to say that the surety in the present case stands in a fiduciary character as regards the debtor. *Miss Smith* does not represent the debtor, except as she takes his real estate, subject to the debt. *Ex parte Rushforth* was a case in bankruptcy; but it does not follow from that case, that, as against the bankrupt himself, the surety would not be entitled to the full amount. In *Butcher v. Churchill* the question was not raised.

Mr. *Wigram*, in reply.

The contract between principal and surety is a contract for indemnity merely; and a surety cannot act also as a stranger, for the purpose of acquiring an additional right against his principal. The Defendants *Norris* and *Smith* made use of their position as executor and devisee to induce Lord *Vernon's* executors to compound the debt, by telling them that the estate of the surety was insufficient to pay it.

The LORD CHANCELLOR.

April 3.

In this case the object is to obtain payment, on the part of an obligee in a bond for 1000*l.*, of what is

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due for principal and interest upon that bond. The demand is resisted on various grounds. It appears that there being a bond for 1000*l.*, in which the son was obligor, and which was given to the father as obligee, a debt arose between the father and Lord *Vernon*, and the father became indebted to Lord *Vernon* in 500*l.* secured by bond, and the son became surety in that bond; and then this memorandum of an agreement between the father and son, was endorsed on the bond for 1000*l.* [His lordship read the memorandum.]

Now it is said that the original bill prayed for payment of the interest on the 1000*l.* bond, and that upon discharge of the bond for 500*l.*, and so releasing the estate of *Richard Bevan* the younger from the liability upon that bond, then the principal money, 1000*l.*, might be paid. It was said that the whole suit ought to be dismissed, because, at the time at which the bill was filed, there was no right on the part of the father's estate to obtain payment; inasmuch as the 500*l.* bond had not been paid to Lord *Vernon*; and it was contended, that the terms of this memorandum shew that it was the intention of the parties, that neither principal nor interest should be demanded upon the son's bond for 1000*l.*, until the bond for 500*l.* given to Lord *Vernon* should have been discharged.

Now it appears very clear from the words of the memorandum, that it was the principal money which was not to be called for: there was no undertaking on the part of the father not to sue for the interest on the bond for 1000*l.*, until he should have paid to Lord *Vernon* both principal and interest on the bond for 500*l.* It would, indeed, have been a most extraordinary arrangement for the father to make, inasmuch as the one bond was to secure 1000*l.*, and the other 500*l.* only. The principal money due from the son to the father was
equal

equal to the penalty of the bond given by the father to Lord *Vernon*, and for which the son had become surety. The son, therefore, retained that principal money as an indemnity against whatever demands might be made upon him in respect of the bond so given to Lord *Vernon*.

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Being of that opinion with respect to the construction of this memorandum, it is unnecessary for me to consider what would have been the equities of the parties, if the agreement had extended to the interest as well as to the principal. Supposing the memorandum had been made applicable to the interest, the son's defence would be, I owe my father's estate 1000*l.*, and a long arrear of interest, but my father has agreed that so long as half the amount of the principal remains due from him, for a debt for which I am surety, I am not to be called on to pay either principal or interest upon the larger sum. The effect of that might be, that the father might be entitled to receive 3000*l.* or 4000*l.* from the son, and because he owed half that sum, in respect of the debt for which the son was surety, he might be forever precluded from receiving any part of the larger sum. The only probable way in which the equities would be administered between the parties, would be that the father should have brought an action upon the bond for 1000*l.*, as his representative did, and that the son should have come here for an injunction. It is true that an injunction was granted in the first instance in a former suit, and properly granted, for the father's representative was proceeding to recover the principal as well as the interest; but if the parties had come before the Court to have their equities administered, I think that the Court would have had no difficulty in administering those equities in such a manner as to give the son complete indemnity, and at the same time to give the father's estate all the benefit he was entitled to receive.

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But it is unnecessary to consider this further, for I am of opinion that, by the contract itself, interest money was payable, and that there was, therefore, that which entitled the plaintiff to file his bill in this Court. There must be an account of what is due for the interest on the bond for 1000*l.*, the amount of which might have enabled the father to discharge the obligation to Lord *Vernon*, and so to obtain payment of the principal money of 1000*l.*

The other question is, how far the representatives of the son, the surety, having come to an arrangement with Lord *Vernon's* executors, by which the bond for 500*l.* has been got rid of and discharged, are entitled, as against the father's estate, to demand more than they have actually paid to Lord *Vernon's* executors in exoneration of the liability of the son's estate upon the bond for 500*l.*

Now, if there had been no authority upon this subject, I should have found very little difficulty in making a precedent for deciding that, under these circumstances, the surety is not entitled to demand more than he has actually paid. I take the case of an agent. Why is an agent precluded from taking the benefit of purchasing a debt which his principal was liable to discharge? Because it is his duty, on behalf of his employer, to settle the debt upon the best terms he can obtain; and if he is employed for that purpose, and is enabled to procure a settlement of the debt for any thing less than the whole amount, it would be a violation of his duty to his employer, or, at least, would hold out a temptation to violate that duty, if he might take an assignment of the debt, and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle. Does not the same duty devolve
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on a surety? He enters into an obligation and becomes subject to a liability, upon a contract of indemnity. The contract between him and his principal is, that the principal shall indemnify him from whatever loss he may sustain by reason of incurring an obligation together with the principal. It is on a contract for indemnity that the surety becomes liable for the debt. It is by virtue of that situation, and, because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrangement with that creditor. It is his duty to make the best terms he can for the person in whose behalf he is acting. His contract with the principal is indemnity. Can the surety, then, settle with the obligee, and instead of treating that settlement as payment of the debt, treat it is an assignment of the whole debt to himself, and claim the benefit of it, as such, to the full amount; thus relieving himself from the situation in which he stands with his principal, and keeping alive the whole debt?

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As I have said, I would make a precedent if there were none; but it is very satisfactory to me to find that the question came before Lord *Eldon*, and that he decided it in the cases which have been cited, viz. *Ex parte Rushforth* (a), and *Butcher v. Churchill*. (b) Lord *Eldon* did not decide those cases upon particular grounds of equity between the parties; but he lays it down as what he considers to be the rule of this Court, that where a surety gets rid of and discharges an obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount; but can only claim, as against his principal, what he has actually paid in discharge of the com-

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(a) 10 *Ves.* 420.

(b) 14 *Ves.* 567.

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mon obligation. I am clearly of opinion, therefore, that the representatives of *Richard Bevan* the younger can in this case claim only the amount which was actually paid in satisfaction of the bond given to Lord *Vernon*.

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June 8, 9.

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January 20.

Lands were limited by deed to the use of the settlor for life; remainder to the use of his wife for life; remainder to the use of the heir female of the body of the settlor, on the body of his wife already begotten and now living, or which may be begotten hereafter; and in default of such issue, to the use of the heir male of the body of the settlor on the body of his wife to be begotten; remainder to the right heirs of the settlor.

CHAMBERS v. TAYLOR.

BY an indenture made the 2d of *February* 1758, between *Joseph Chambers* of the one part, and the Reverend *John Chambers* and *George Messenger* of the other part, reciting that for and in consideration that *Martha*, the wife of *Joseph Chambers*, had agreed to sell part of her estate for the discharge of her said husband's debts, and also for the settling, conveying, and assuring the several closes of land thereafter mentioned, on the issue of *Joseph Chambers* and *Martha* his wife, and for divers other good causes and considerations him thereunto especially moving, he, *Joseph Chambers*, did thereby grant, bargain, and sell, alien, release, and confirm, unto *John Chambers* and *George Messenger* all those his several closes of arable, meadow, or pasture ground therein particularly described, to hold the same with their appurtenances unto the said *John Chambers* and *George Messenger*, their heirs and assigns, to the use of *Joseph Chambers* for the term of his natural life; and from and after the determination of that estate, to the use of the said *John Chambers* and

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At the time when this deed was executed, the settlor and his wife had issue four daughters, and no issue male; but at his death the same four daughters and also several sons of the marriage survived him: Held, that under the limitation to the heir female, the daughters took a life estate in the lands as purchasers.

George Messenger, their heirs and assigns, for the life of *Joseph Chambers*, upon trust for preserving contingent remainders; and from and after the death of *Joseph Chambers*, to the use of his wife *Martha*, for the term of her natural life, in part of her jointure or dower, but not in full, in case she survived her said husband; and from and after the decease of his said wife, as for and concerning all and singular the premises (except the dwelling-house in which *Joseph Chambers* then lived), "to the use and behoof of the heir female (a) of the body of the said *Joseph Chambers*, on the body of his said wife *Martha* already lawfully begotten and now living, or which may be begotten hereafter; and in default of such issue, to the use and behoof of the heir male of the body of the said *Joseph Chambers* on the body of his said wife *Martha* to be begotten; and in default of such issue, to the use and behoof of the right heirs of the said *Joseph Chambers* for ever; upon condition that they pay the sum of 100*l.* of lawful money of *Great Britain* to the right heirs of the said *Martha Chambers* within twelve months next after they come into possession of the above granted premises."

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At the time when this deed was executed, *Joseph Chambers* had issue, by his wife *Martha*, four daughters only; but at the time of his death, which happened a few years afterwards, he left, besides those daughters, several sons,

(a) It was suggested, that the words "heir female" and "heir male," in this and the subsequent limitations, had originally been written "*heirs female*" and "*heirs male*" respectively; and that the letter *s* had been fraudulently erased subsequently to the execution of the deed; but

this suggestion was afterwards abandoned, and the question of construction was argued and decided, throughout, on the assumption, that at the time when the deed was executed, the words of the two limitations stood as they are printed in the text.

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sons, by his wife *Martha*, surviving him, of whom *John*, the eldest, was his heir-at-law. *John Chambers*, the eldest son, some time afterwards died without issue, leaving *William Chambers*, his next brother and heir-at-law, who thereupon became the heir-at-law of *Joseph Chambers*, the settlor, and who also subsequently died, leaving the present Plaintiff, *John Chambers* the younger, his only son and heir-at-law, and also the heir-at-law and heir male of *Joseph Chambers*, the settlor.

Martha Chambers, the widow, upon the death of her husband, entered into possession of the settled premises, and continued to receive the rents and profits thereof until her death, which took place in the year 1800. Her four daughters survived her. *Martha*, one of the daughters, married a person named *Taylor*, who, in right of his wife, entered into possession, or enjoyed the rents and profits of the premises, on behalf of his wife and her three sisters. *Martha Taylor* survived her husband and her three sisters; and, having taken possession of the premises immediately after her husband's death, she continued in such possession until the year 1832, when she died, leaving several children, of whom her son *John* was her heir-at-law. On the death of *Martha Taylor*, *John Chambers* the younger claimed to be entitled to an estate in fee simple in the property comprised in the settlement; and a person who had occupied the premises as a tenant under *Martha Taylor* was induced to attorn to him as tenant. An action of ejectment was thereupon commenced by the children of *Mrs. Taylor*, against *John Chambers* the younger, to recover possession of the premises, to which they claimed title under their mother's will; and *Chambers*, the Defendant in that action, then filed the present bill, praying a discovery and production of the settlement of 1758, and an injunction in the meantime.

The

The case came before the Court, in the first instance, upon a motion that the Defendants might produce the settlement, which was admitted by their answer to be in their possession; but, in order to save unnecessary litigation, it was ultimately agreed that the judgment of the Lord Chancellor should be taken upon the construction of the settlement, and that all parties in the cause and in the action of ejectment should be concluded by his Lordship's decision. This arrangement was made in the time and with the assent of Lord Chancellor *Brougham*. The matter stood over for a considerable period in consequence of accidental circumstances, and the question now came on to be argued before Lord *Cottenham*.

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Mr. *Wigram*, Mr. *Wray*, and Mr. *Wightman*, for the Plaintiff.

Under the limitation to the heir female of the settlor on the body of his wife already begotten and now living, or which may be begotten hereafter, the daughters of the settlor took a life estate in the settled property as purchasers; and upon the death of Mrs. *Taylor*, the last survivor of those daughters, in the year 1832, the title of the Plaintiff accrued. This construction is supported, as well by the peculiar language of the limitation, which plainly pointed to individuals then in *esse* as persons who were to take a vested remainder in the property, as by the whole scope and context of the settlement. The expression "heir female now living or hereafter to be begotten," like the subsequent expression "heir male of the settlor on the body of his wife to be begotten," was plainly intended to operate as *designatio personæ*, and is, in that respect, contradistinguished from the ultimate limitation to the right heirs of the settlor. The old doctrine, that the special heir,
in

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in order to take as a purchaser, must answer both parts of the description, that is to say, of heir as well as female, has been long exploded, wherever it appears clear from the language and context of the instrument, that in order to give a sensible meaning and operation to the words a different construction is necessary. Here the addition of the words "now living," proves incontestably that the prior words "heir female" were used, not in their technical but in their popular sense, as descriptive of the settlor's daughters; for *nemo est hæres viventis*. A contrary construction has been sometimes adopted in wills, where the Court, in order to prevent the estate from being lost to the remoter descendants of the first taker, is inclined to consider a devise to the heirs of the body of the first taker as words of limitation, so as to vest an inheritable estate in the parent: but that principle has no application in the case of a deed *inter partes*, where the intent of the contracting parties is to be strictly followed out; and still less to a case where the word "heir" occurs in the singular number without any words of inheritance superadded. *Co. Litt. (a)*, *Archer's case (b)*, *Walker v. Snow (c)*, *Bony v. Taylor (d)*, *Bayley v. Morris. (e)* The authorities cited by Mr. Hargrave in his note (g) upon the passage in the *First Institute*, for the purpose of proving that "heir" in the singular, may be *nomen collectivum* as well in a deed as a will, and operate, in both, in the same manner as "heirs" in the plural number, will be found, on examination, with one exception only, to be cases of wills. If the word "heir-female" in the present instance were held to be *nomen collectivum*, operating as a word of limitation, the person taking an
 estate

(a) 8 b. 20. a. 22 b. 25. a, b.

(b) 1 Rep. 66.

(c) Palm. 359.

(d) 16 Vin. Ab. 213. Parols.

(e) 4 Ves. 788.

(g) Co. Litt. 3. b. note 4.

estate tail would be the settlor himself; and the consequence would be, that he might by means of a fine or common recovery, have at any moment defeated the whole object of the settlement by destroying the subsequent limitations, — a consequence which certainly was never contemplated by any of the contracting parties. Supposing, then, that the limitation to the heir female gave a valid remainder to the daughters as purchasers, the interest which they took in the settled property was no more than a life estate; and upon the death of Mrs. *Taylor*, the Plaintiff became entitled, either in the character of heir male of the settlor, or under the ultimate limitation to his right heirs.

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The Solicitor-General and Mr. *Purvis*, for the Defendants.

It is extremely doubtful, whether, from the strange and inconsistent language of the clause, the limitation in favour of the heir female is not absolutely void for uncertainty. Assuming the expression to be "*heir female*," the party who claims as a purchaser under such a limitation must be heir as well as female; *Co. Litt. (a)* and Mr. *Hargrave's notes. (b)* The doctrine of Lord *Coke* on this point has never been over-ruled. On the contrary, the authorities, as Mr. *Hargrave* has satisfactorily shewn, are entirely in accordance with it. The case of *Goodtitle dem. Bailey v. Pugh (c)*, by which it was supposed to be shaken, has been reversed by the House of Lords. *(d)* At the time when the settlement was executed, there was no person *in esse* filling the character of the settlor's heir female; for *nemo est hæres viventis*; and no person answered that description at the time when, by the settlor's

(a) *Co. Litt.* 24. b.

(c) *Fearne, C. R.* 573. 8th ed.

(b) *Co. Litt.* 24. b. note 3.

(d) See 2 *Meriv.* 348, 349.

164. a. note 2.

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settlor's death, the contingency upon which the remainder was to vest, if it vested at all, was of necessity to be determined. The daughters, who were then living, were not the settlor's heirs-at-law, for he left two sons; and the Plaintiff is the son and heir of the younger of those sons, and is also the heir-at-law of the settlor. The contingent remainder to the heir female, therefore, having failed to take effect, the Plaintiff's title, or the title of those under whom he claims, accrued upon the death of the settlor, or at any rate upon the death of the widow, six and thirty years ago, and must now be barred by lapse of time.

The only other construction which, consistently with the authorities, can be put upon the gift to the heir female, and the only one by which any effect would be given to the words, would be to consider them as words of limitation. That the words "heir male" or "heir female" of the body, though in the singular number, are properly words of limitation, and not of purchase, is clear from many authorities; *Dubber v. Trollope* (a), *Blackburne v. Stables* (b). If the words are so construed here, the effect will be to create an estate in tail female in the settlor. This, it is admitted, might be done in the case of a will, if the word had been "heirs" instead of "heir female;" but it is said that this is the case of a deed, and a further distinction is taken on the ground that "heir" is used in the singular number; and reliance is for this purpose placed on a sentence in the *First Institute* (c), where his Lordship lays it down, that, if land be given "to a man and his heir, in the singular number, he hath but an estate for life, for his heir cannot take a fee simple by descent, because he is but

(a) *Amb.* 453.

(c) *Co. Litt.* s. b.

(b) 2 *Ves. & B.* 371.

but one, and therefore, in that case, his heir shall take nothing." It is obvious, however, as Lord Chief Justice *Eyre* has observed in *Dubber v. Trollope* (a), that, in the passage in the text of *Littleton* which gave rise to Lord *Coke's* remark, the attention of *Littleton* was not at all directed to any supposed distinction between the effect of the word "heir" in the singular, and "heirs" in the plural number. And the note which Mr. *Hargrave* has appended to that part of the commentary, and the authorities there collected, prove that Lord *Coke* was mistaken in his opinion; and that, as well in a deed as in a will, the word "heir," in the singular, may operate as *nomen collectivum*; as indeed appears to be admitted in subsequent passages in the *Institute* itself. (b) In *Richards v. Lady Bergavenny* (c), it was held that a devise to *A.* for life, and to such heir of her body as should be living at her death, with a remainder over in default of such, was a good estate tail in *A.* *White v. Collins* (d), *Idle v. Cook*. (e) There is no ground for the distinction suggested between cases upon deeds and cases upon wills, where the limitations are such as to create an estate tail; for the provisions of the statute *de donis*, directing that the will of the donor shall be observed, have placed them on precisely the same footing. Where words of limitation are superadded to the word *heir*, they convert it into a word of of purchase; *Fearne's Cont. Rem.* (g); and that constitutes the distinction in *Archer's Case*. But there is no such addition here. Neither is there any thing in the context from which it can be certainly inferred that the settlor meant to use the words in a sense different from their technical sense. Reliance is placed on the effect of the expression "now living," as qualifying the meaning of the

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(a) *Amb.* p. 458.

(b) See 20 a. 22 a & b.

(c) 2 *Vern.* 324.

(d) *Com.* 200.

(e) 2 *Ld. Raym.* 1152.

(g) Page 178. 8th ed.

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the words "heir female." But in an instrument framed so loosely and carelessly as this seems to have been, such a phrase was probably thrown in only *ob majorem cautelam*, in order to include those already in existence as well as those who might be born afterwards. Indeed, they rather point at a continuity of enjoyment of the estate, and, in some degree, tend to supply the want of plurality in the word of limitation. The subsequent words "in default of such issue," seem to indicate an event which might or might not happen; a mode of expression which would be quite incorrect and inapplicable, if, according to the Plaintiff's construction, the settlor's daughters were intended to take as *persona designata* for their own lives.

Mr. Wigram, in reply.

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 January 20.

The LORD CHANCELLOR.

By deed, after marriage, the property in question was settled to the use of the husband for life, with remainder to the use of the wife for life; and after her decease, to the use of the heir female of the bodies of the two, lawfully begotten, and now living, or which may be begotten hereafter; and in default of such issue, to the use of the heir male of the bodies of the two, to be begotten; and, in default of such issue, to the use of the right heirs of the husband, who was the settlor. There were issue of the marriage several sons and daughters. The Plaintiff is the son of the second son, the eldest being dead without issue. The Defendants are the son and daughters of *Martha*, the surviving daughter. The Plaintiff alleges that the daughters took an estate for life only, and that the Plaintiff, as heir male or heir-at-law of the settlor, became entitled upon the death of *Martha* the surviving daughter. The Defendants contend, that the
 limitation

limitation to the settlor's heir female, gave to the daughters an estate tail; or that the remainder to the heir female was void; and that the Plaintiff's title having accrued upon the death of the widow of the settlor, thirty-six years ago, it is now barred by time.

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There are, therefore, two questions: 1st, whether the remainder to the heir female was void; 2dly, if not, what estate did the daughters take.

Of the real intention there can be no doubt. When a man speaks of his heir female, he means such person as would be heir, if females only were capable of being heirs. But the Defendants contend that, as there were sons, the daughters were not heirs at law, and that the remainder is therefore void.

The law upon this subject has undergone a considerable change; but there never was a time, I apprehend, in which these remainders would have been held void. The words of the limitation are, "to the heir female of the body now living, or which may be begotten hereafter."

The older cases upon the subject are collected and ably discussed by Mr. *Hargrave* in a note to the *First Institute* (a), in which he strongly supports Lord *Coke's* doctrine, that the party to take must be *very* heir, as well as *female*, but admits that it might be otherwise if there were additional words shewing that the word "heir" is used in a special sense; as where land is devised to the heir male *now living*, the very words to be found in this deed. At the conclusion of that note, in laying down what he then conceived to be the rule, Mr. *Hargrave* confines it to cases in which the words stand unexplained

(a) *Co. Litt.* 24 b. note 3.

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explained by any other words or circumstances; and, in another note to the same book (a), he considers the rule in all cases as having been greatly shaken, if not altogether destroyed, by the subsequent decisions there referred to. In *Goodtitle dem. Bailey v. Pugh* (b), Lord Mansfield says, "Since *Newcomen v. Barkham*, the doubts about the necessity of being very heir have been at an end."

It is not, however, necessary to consider the merits of this contest; because, according to the most strict construction of the rule, the words "heir female" might at all times have been good words of description of a purchaser, although the party was not heir-at-law, if there were other words to explain the sense in which the words were used; and the words used in this case are, I think, quite sufficient for that purpose.

What estate then did the heir female, that is, the daughter, take; for it was not argued that the parent took more than an estate for life? In *Lewis Bowles's Case* (c), an estate was settled by deed to the use of the husband for life, remainder to the wife for life; and after their decease, to the use of their joint issue male, and the heirs males of such issue; and it was held, that there being issue male, the parents were tenants for life; remainder to the issue male in tail. In *Bayley v. Morris* (d), a limitation by deed, after life estates to the husband and wife, to the heir male of their bodies, and to his heirs, and for want of such issue, to the daughters; and if there should be no issue of the marriage, to the right heirs of the husband, was held to be a contingent remainder in fee to the person who

(a) *Co. Litt.* 164 a. note 2.(c) 11 *Rep.* 79.(b) *App. to Butler's Fearn,*(d) 4 *Ves.* 788.

C. R. 573.

who should be the heir male at the determination of the life estates.

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Here is a gift to the heir female of the body, in a deed, without any words of inheritance; for the words "in default of such issue" mean only, in default of an heir female of the body now living, or hereafter to be begotten, and do not carry the interest beyond the original gift.

A passage in *Co. Litt. 22. a.* was cited for the Defendants, where Lord *Coke* refers to a decision that a limitation to a man and his wife and one heir of their bodies, and one heir of the body of such heir was an estate tail. He does not express any approbation of this; but says that a limitation *hæredi*, in the singular number, would not give a fee simple at common law. The case so put, however, differs essentially from the present, because, in that case, there were words of inheritance and succession. The same observation applies to *Richards v. Lady Bergavenny (a)*, which was a case arising upon a will: there, the limitation, which was to a mother, and such heir of her body as should be living at her death, was held to be an estate tail in the mother.

In *Dubber v. Trollope (b)*, which was the case of a will, C. J. *Eyre* guards himself against being supposed to give any opinion as to what would be the effect of the words if used in a deed. *White v. Collins (c)* was also the case of a will, and only proves, what many other cases establish, that a limitation by will to *A.* for life, with remainder to the heir of his body, without words of inheritance superadded, creates an estate tail in the first taker, when nothing explains the testator's intention to the contrary; otherwise not. And *Archer's* case is to the like effect. (*d*)

These

(a) 2 *Vern.* 324.

(c) 1 *Com. Rep.* 289.

(b) *Amb.* 455.

(d) 1 *Co.* 66.

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These cases, indeed, prove that the word "heir," in the singular number, has sometimes the same effect as the word "heirs" in the plural; but if words of limitation are superadded to the word "heir," it is considered as conclusively shewing that the word is used as a word of purchase. When that is not the case, it is considered, in construing wills, as *nomen collectivum*, for the purpose of creating an estate tail in the first taker, and not as creating an estate tail in the person answering the description of heir. If the word "heir" would, *per se*, give an estate of inheritance to the party answering the description, there would be no reason for any distinction, whether words of limitation or inheritance were or were not superadded. These cases, therefore, prove that the daughters would not have taken estates of inheritance as purchasers under a will; and it is not pretended that their parents took more than estates for life.

It was argued that the statute *de donis* provides that the will of the donor shall be observed, and that cases upon wills are, therefore, authorities upon the present question. Lord Coke, however, says (a), that such will must agree with the rules of law. Therefore a gift to a man *et exitibus de corpore suo legitime procreatis*, or *semini suo*, gives only an estate for life; and the word issue is not allowed in a deed to operate as a word of limitation. Accordingly in *Makepiece v. Fletcher* (b) a limitation, in a deed, to the settlor's daughter and the issue of her body, and in default of such issue, over, was held not to give an estate tail to the daughter.

I am, therefore, of opinion that the daughters of *Joseph Chambers* took, by purchase, but for life only, and that the title of the Plaintiff accrued upon the death of

(a) *Co. Litt.* 20. b.

(b) 2 *Com. Rep.* 457.

of *Martha*, the survivor of the daughters, and that he is now entitled.

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In so holding, I am following the more modern authorities, and am not violating any rule to be found in the older cases; and I have no doubt that this construction carries into effect the real intention of the parties.

JOMBART v. WOOLLETT.

January 31.
March 18.

THE Plaintiffs were the partners in a mercantile house established at *Lille* in *Flanders*, and carrying on business under the firm of *Jombart* and Co. In the months of *July* and *August* 1836, *Jombart* and Co. employed the Defendant *Joseph Woollett*, who was a merchant in *London* trading under the firm of *Woollett* and Son, as their banker or commission agent for the purpose of accepting and taking up bills of exchange on their behalf. The transactions between *Jombart* and Co. and *Woollett* and Son, did not extend to any other commercial dealings, but were entirely confined to such banking or commission agency, in which it was agreed that *Jombart* and Co. should draw bills of exchange upon *Woollett* and Son, which *Woollett* was to accept in the name of his firm; and that in order to provide funds

A merchant abroad sent drafts from time to time to his *London* correspondent for acceptance, under an authority for that purpose, and upon an understanding that the liabilities of the latter in respect of all such acceptances, should be covered by means of bills payable in *London* to be remitted to him from time to time.

Under such an arrangement, the presumption is, until an agreement to the contrary is shewn, that the *London* correspondent was not intended or entitled to treat the bills, so remitted, as cash, or to discount them before maturity; and, therefore, it was held that two of such bills, which were existing in specie in his hands at the time of his bankruptcy, and were not then due, did not pass to his assignees, but were the property of the party who had remitted them.

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funds for the payment of such bills when at maturity, *Jombart* and Co. should transmit to *Woollett* cash or bills of exchange payable in *London*.

In the months of *July* and *August* 1836, *Jombart* accordingly drew upon *Woollett*, in the name of *Woollett* and Son, the following bills of exchange: — A bill for 588*l.* 5*s.* 8*d.* dated *July* 21. 1836, in favour of *Osborn* and Son, which became due on the 24th of *October* following; a bill for 478*l.* 6*s.* 5*d.* in favour of *Moens* and *Dauncey*, dated *July* 29. 1836, and which became due on the 27th of *October*; a bill for 340*l.* in favour of *Schaezler* and *Brentanos*, dated *July* 27. 1836, and which became due on the 28th of *October*; a bill for 500*l.* in favour of *Charles Fea*, dated *August* 2. 1836, and which became due on the 31st of *October*; a bill for 53*l.* 11*s.* 3*d.* in favour of *Hives* and *Atkinson*, dated *August* 5. 1836, and which became due on the 28th of *August*; and a bill for 644*l.* 13*s.* 9*d.* in favour of *Charles Fea*, dated *August* 9. 1836, and which became due on the 9th of *November* following. All these bills were duly accepted by *Joseph Woollett* in the name of the firm of *Woollett* and Son.

In order to enable *Woollett* and Son to take up these acceptances, as they became severally due, *Jombart* and Co. from time to time remitted to *Woollett* and Son, by whom they were duly received and acknowledged, the following bills of exchange, which *Jombart* and Co. had purchased, and which were duly accepted and made payable in *London*; namely, a bill for 300*l.* on *Esdaile* and Co, which became due on the 16th of *September* 1836; another bill for 300*l.* on *Esdaile* and Co. which became due on the 25th of *October*; a bill for 500*l.* on *Gower* and Co. which became due on the 3d of *November*; a bill for 50*l.* on *Guillaume* and Co. which be-
 came

came due on the 18th of *November*; a bill for 1000*l.* on Messrs. *Trye* and *Lightfoot*, which became due on the 20th of *November*; and a bill for 440*l.* on Messrs. *Trye* and *Lightfoot*, which became due on the 23d of *November*; together with a Bank of *England* note for 10*l.*, which was received by *Woollett* on the 18th of *October*.

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The nature of the arrangement and the course of dealing between the parties were chiefly to be collected from the language of the correspondence which passed between them, while these transactions were going on.

In the month of *July*, *Jombart* and Co. sent the following letter to *Woollett* and Son: — “ *Lille*, 26th *July* 1836. On our particular account you have accepted our draft in favour of *Osborn* and Son, for 588*l.* 5*s.* 8*d.* under date 21st current, at ninety days’ date, for which your account is credited. We have this day drawn upon you a bill for 478*l.* 6*s.* 5*d.* at ninety days’ date in favour of *Moens*, *Dauncey* and Co. And we have also the pleasure to inform you that Messrs. *Schaezler* and Co. of *Liverpool* will draw on our account a sum of about 330*l.*”

On the 28th of *July*, *Jombart* and Co. again wrote to *Woollett* and Son as follows: — “ Be so good to take note, that we have authorised Mr. *C. Fea* of *Canterbury* to draw upon you on our account, for the sum of 500*l.* which we beg you will duly honour.”

Immediately afterwards, *Woollett* and Son wrote and sent the following letter to *Jombart* and Co.: — “ *London*, 29th of *July* 1836. We have to observe that we have accepted, on your account, your bills upon us, 588*l.* 5*s.* 8*d.*, due the 21st of *October*, in favour of *Osborn* and Son, and 478*l.* 6*s.* 5*d.* due 24th of *October*, in

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favour of *Moens* and Co., which we have carried to your debit, relying upon you to cover us in due time. According to your authorisation, your friends Messrs. *Schaezler* and Co. have drawn upon us on your account 340*l.*, 27th current, at ninety days date."

In the month of *August*, *Jombart* and Co. wrote to *Woollett* and Son as follows: — "*Lille*, 2d *August* 1896. We have your letter of the 29th ult. You have now under acceptance for our account the sum of £1906 12 1 and moreover we have drawn upon you 644 13 9

which will make together - - 2551 5 10
 We shall not draw upon you beyond this sum without having your authorisation, considering it as if you had limited our credit with you by acceptance less in amount. You must tell us frankly, and we will cover you immediately."

On the 4th of the same month *Woollett* and Son wrote to *Jombart* and Co. as follows: — "We are favoured with yours of the 2nd, by which we observe that you intend drawing upon us for 644*l.* 13*s.* 9*d.*, which we shall accept to your debit. You are already informed of our principle of credit which we afford to our friends. Above all in banking affairs, as you desire us to speak frankly, for the future you will consider this facility established between us for the amount of 2000*l.*"

On the 9th of *August*, *Woollett* and Son wrote to *Jombart* and Co. as follows: — "We have received your letter of the 6th, advising your bill of 644*l.* 13*s.* 9*d.* in favour of *C. Fea*, which we have accepted to your debit."

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On the 8th of the same month, *Jombart* and Co. wrote to *Woollett* and Son as follows: — “We confirm our letter of the 6th, advising our bill of 644*l.* 13*s.* 9*d.* in favour of *C. Fea*, at three months’ date. Enclosed we remit you 300*l.*, due the 13th of *September*, which we beg you to carry to the credit of your account.”

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On the 11th of *August*, *Woollett* and Son wrote to *Jombart* and Co. as follows: — “We confirm our letter of the 9th current, which was crossed by yours of the 8th, by which we have received 300*l.*, due 13th (16th) of *September*, which shall be carried to your credit.”

On the 23d of the same month, *Jombart* and Co. wrote to *Woollett* and Son as follows: — “We have your letter of the 11th which requires no answer. Enclosed we remit 300*l.*, due 25th of *October*, which we request you to get accepted, and carry the same to the credit of our account. We recall to your recollection a bill for 53*l.* 11*s.* 3*d.* payable 25th current. Be pleased to pay it, and pass it to our credit.”

On the 26th of *August*, *Woollett* and Son wrote to *Jombart* and Co. as follows: — “You remit us, by your favour of the 23d current, 300*l.* due 22d (25th) *October*, upon *Esdaile* and Co., upon which we will do the needful, and pass it to your credit as soon as received.”

On the 15th of *October*, *Jombart* and Co. wrote to *Woollett* and Son as follows: — “Enclosed, we remit 500*l.* due 31st *October*, 50*l.* due 15th *November*, 10*l.* at sight, making 560*l.*, of which please to give credit and acknowledge receipt.”

On the 17th of the same month, *Woollett* and Son wrote to *Jombart* and Co. as follows: — “We have re-

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ceived your favour of the 15th current, covering 10*l.* at sight, 500*l.* due the 31st *October* (3d *November*), 50*l.* due 15th (18th) *November*, amounting to 560*l.*, to your credit when due."

On the 19th of *October*, *Jombart* and Co. wrote to *Woollett* and Son as follows: — "By your letter of the 17th current, you acknowledge the receipt of remittances which you have carried to the credit of our account. You have herewith a bill for 1000*l.* upon *Trye* and *Lightfoot* of your city, to your debit. Please to acknowledge the receipt."

On the 21st of the same month, *Woollett* and Son wrote to *Jombart* and Co. as follows: — "We have received your favour of the 19th, covering 1000*l.*, due the 17th (20th) of *November*, upon *Trye* and *Lightfoot* of this city, to your credit."

On the 24th of *October*, *Jombart* and Co. wrote to *Woollett* and Son as follows: — "By your favour of the 21st current you acknowledge our remittance of 1000*l.* Enclosed you have a bill for 440*l.*, due 20th *November*, upon *Trye* and *Lightfoot*, which we beg you to place to our credit."

Several other letters passed between the parties, in the course of these transactions, but the foregoing are the most material.

On *Saturday* the 22d of *October* 1836, *Joseph Woollett* became insolvent, and early on the following *Monday* he stopped payment. He gave immediate notice of the fact to *Jombart* and Co.; and by a letter, dated the 26th of *October*, after acknowledging the receipt of the bill for 440*l.*, he informed them that he had sent it for acceptance

acceptance, and would hold it at their disposal ; and by another letter dated the following day, he returned that bill to them.

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With the exception of the bill for 53*l.* 11*s.* 3*d.* drawn on *Woollett* and Son, in favour of *Hives* and *Atkinson*, all the bills accepted by *Woollett* on the Plaintiffs' account were dishonoured, and remained unpaid at the time of his insolvency, and were all subsequently taken up and paid by the Plaintiffs. Of the bills remitted by the Plaintiffs to *Woollett* for the purpose of meeting his acceptances, the whole had been discounted or sold, and the proceeds received by him prior to his insolvency, with the exception of the two bills for 50*l.* and 1000*l.* which then remained in his hands. It appeared that, at the date of *Woollett's* insolvency, he was indebted to the Plaintiffs in upwards of 1000*l.* beyond the amount of these bills. Under an arrangement with the creditors of *Woollett*, the two bills were afterwards sold, and the proceeds carried to the account of the other Defendants (who were three of the principal creditors), upon trust to abide the result of any legal proceedings that might be taken.

The bill prayed that the right of the Plaintiffs to the property in the two bills of exchange might be declared, and the proceeds paid to the Plaintiffs, and that, in the meantime, the Defendants might be restrained from distributing such proceeds among the insolvent's general creditors.

Woollett afterwards became a bankrupt, and his assignees were brought before the Court by supplemental bill.

The Vice-Chancellor having granted the injunction, the Defendants appealed against his Honor's order ;
 and

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and it was arranged between the parties, that the Lord Chancellor's judgment on the appeal-motion should be taken as concluding the question in the cause.

The motion was supported by an affidavit, which detailed the facts and set forth the letters as they have been already stated.

Mr. *Wigram* and Mr. *Richards*, in support of the appeal-motion.

The case may be considered as it stands, first, upon the evidence furnished by the actual dealings between the parties, that is, by the bills drawn and the remittances sent; secondly, upon the correspondence between the two houses; and thirdly, upon the affidavit.

With respect to the last point, it may be observed that the affidavit contains no suggestion that the conduct of *Woollett* was contrary to the custom of merchants, or that he was guilty of a fraud in negotiating the first four bills, although he had discounted them and treated the proceeds as his own monies immediately after they came to hand. In *Ex parte Thompson* (a) Sir *John Leach* lays it down distinctly, that the circumstances of the transaction, and the course of dealing between the parties, may be such as, without any express authority, to justify the banker or agent in dealing with the bills as cash. "What difference (asks his Honor) is there between telling the bankers that they may so use any bills, and drawing upon them in such a way as to make it necessary for them to do so?" The observations of Lord *Eldon* in *Ex parte Sargeant* (b), are to the same purport. If such be the law of the case, the accidental circumstance that these two bills happened

(a) 1 *Mont. & Mac.* 102.

(b) 1 *Rose*, 153.

pened to remain in specie in the hands of the *London* agent, cannot affect the question. If they were his to deal with as his own, it signified nothing whether they were actually converted into cash, or continued in the form of paper at the time of his insolvency. What then is the inference to be drawn from the course of dealing and the state of the account? It is observable that some of the last-drawn bills became payable before other bills which were of an earlier date. The first bill accepted by *Woollett* was drawn in favour of *Hives* and *Atkinson* for 53*l.* 11*s.* 3*d.*: it was dated on the 5th, and became due on the 28th, of *August*. That bill *Woollett* paid. The first bill remitted to him did not become due till the 16th of *September*, so that for upwards of a fortnight he must, unless he had discounted the remittance, have been in advance for *Jombart & Co.* to that amount. On the 16th of *September*, *Woollett* would receive 300*l.* so as to be then in cash, on the whole balance, 246*l.* 8*s.* 9*d.* The next bill, which was for 340*l.*, became due on the 28th of *October*; but on the 18th of that month he received 10*l.* in the form of a bank note, so that he would be in cash 256*l.* 8*s.* 9*d.*, from that day to the 28th, when he would again be out of pocket 83*l.* 11*s.* 3*d.* If *Woollett* was not to be allowed to discount the bills remitted, it was utterly impossible, from the course of these transactions, that he could be in cash at any subsequent period. On the 28th of *October*, he would be in advance 83*l.* 11*s.* 3*d.*; and on the 9th of *November*, when the bill for 644*l.* 13*s.* 9*d.* became due, the amount of the advance would be increased to 728*l.* 5*s.* Unless, therefore, he was to be at liberty to treat the bills as cash, he must have been out of pocket these large sums. Acting upon the supposition that such was the understanding and intention of the parties, he from time to time procured the different bills to be discounted, with the exception of the two bills, the right to which is now in contest. There is not a merchant in *London* who, if placed in that situation,

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situation, would not have understood, and whose employers would not have understood, that he was at perfect liberty to act in the same way. The agreement as stated in the affidavit was to send "cash or bills," — putting the two on the same footing, and obviously implying a right on the part of the agent to treat the bills as cash, and for that purpose to convert them forthwith into money; an inference which is also strengthened by the fact that on one occasion a bank note for a small sum was remitted: indeed, in the foreign market, where the Plaintiffs were of course to purchase their remittances, there was no substantial difference between the two.

The rest of the case depends upon the correspondence. Throughout the whole of that correspondence, so far as it is applicable to these transactions, there is not to be found a single expression which is not quite as consistent with an understanding, that the remittances were to be immediately discounted and treated as cash by the *London* house, as with an understanding that they were to be retained in specie till they became due, and were then to be carried to the credit of the remitters. The expressions "relying upon you to cover us in due time," in the letter of the 29th of *July*, and "upon which we will do the needful and pass it to your credit," in the letter of the 26th of *August*, are of this uncertain and equivocal description; and where the language used is ambiguous, recourse must be had to the dealing of the parties, in order to construe the agreement. The correspondence was not meant to evidence the contract, but like the acts of the parties, merely forms part of a general transaction, the whole of which must be looked at for the purpose of discovering what the contract was. In *Bent v. Puller* (a), a case which in its circumstances strongly resembled this case, Mr.

Justice

(a) 5 *T. R.* 494.; and see *Ex parte Sargeant*, 1 *Rose*, 153.

Justice *Buller* said, that "in order to make it a specific appropriation of bills, there must be a lodging of a bill for a bill, or at least several deposited at once as one entire transaction to answer some particular purpose; whereas here the bills were paid in on a general running account, and the amount of the bills claimed as a deposit not even corresponding with the amount of those for which they were supposed to be deposited."

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The *Solicitor-General* and Mr. *Bligh*, *contra*.

It is for the Defendants to shew some contract taking these bills out of the general rule. That rule has been long well settled. It is clear that, if I remit bills to a banker, he cannot, in the absence of an express authority from me to that effect, take upon himself to sell those bills and place the proceeds to my credit; *Ex parte Pease* (a), *Ex parte Smith* (b), *Ex parte Armistead* (c), *Ex parte Frere in the matter of Sikes* (d), *Thompson v. Giles* (e), *Buchanan v. Findlay*. (g) In *Ex parte Pease* Lord *Eldon* carries the principle much further than is necessary for the Plaintiffs' case; for his Lordship there distinctly lays it down that, although an express authority has been given to discount the bills for particular purposes, or to a limited amount, or even to discount them generally, still, if the bills remain in specie at the time of the banker's stopping payment, and the balance of the account is in favour of the customer, the latter is entitled to recover them.

What then was the meaning and object of the Plaintiffs in making these remittances to *Woollett*? Doubtless for his security,—to give him a lien upon them, to cover the amount of any advances under which he might come

(a) 19 *Ves.* 25. 1 *Rose*, 232.

(b) *Buck*, 355.

(c) 2 *Gl. & Jam.* 371.

(d) 1 *Mont. & Mac.* 363.

(e) 2 *B. & Cress.* 422.

(g) 9 *B. & Cress.* 758.

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come on their account. And this, which is the short and simple history of the transaction, is borne out by every fact in the case, and by every expression in the correspondence. The bills were remitted for the purpose of "covering," that is, being security to *Woollett* for, the amount of the liabilities which he was from time to time undertaking on the Plaintiffs' behalf by accepting their drafts. For the amount of those liabilities he had a lien on the bills remitted; and as those bills became due and were paid, he was entitled to reimburse himself out of the proceeds.

With respect to the observations on the course of dealing, and on the manner in which the account was kept by *Woollett*, it is a sufficient answer to say, what will not be disputed, that the Plaintiffs were not privy to the account, and never acquiesced in it. How indeed could they, inasmuch as they never saw it until after the insolvency took place? If the arrangement was such as the Defendants represent it to have been, where was the accommodation to the Plaintiffs? *Woollett* would become the mere hand for converting the remittances of the Plaintiffs into cash, and thereout paying the amount of their drafts as they became severally due. The whole of the dealings between the parties however, as explained by their own letters, abundantly prove that there was to be a mutual credit and accommodation between them. The result would be that sometimes *Woollett*, and sometimes *Jombart & Co.*, would be in advance; but it formed an essential part of the arrangement, as stated in *Woollett's* letter of the 4th of *August*, that the extent of credit to be afforded by him should not exceed 2000*l.* Upon inspecting the account, however, it will be found that, if *Woollett* was to be at liberty to discount the remittances as he received them, instead of affording any credit to the Plaintiffs, he would never be in advance a single shilling on their account; a consequence

quence utterly irreconcilable with the nature of the transaction and the whole tenor of the correspondence. The statement in *Woollett's* letter of the 17th of *October*, that he had received 560*l.* to the credit of the Plaintiffs *when due*, has not been, and cannot be, explained on any other supposition than that the bills were not to be treated as cash until they became payable in the ordinary course. That such was *Woollett's* own understanding of the matter is also obvious from the fact that, immediately after his insolvency, he indorsed and returned to the Plaintiffs the bill for 440*l.* which they had remitted to him only three days before.

There is another view in which the title of the Plaintiffs to recover these bills is indisputable. The bills were remitted upon a special trust. They were intended to cover the amount of *Woollett's* liabilities for the Plaintiffs, and were therefore specifically appropriated towards meeting the acceptances under which he had come on their behalf. Those acceptances, however, *Woollett* has not met. On the contrary, the Plaintiffs have been themselves obliged to take up and pay them, to a large amount; and as the bills were thus fixed in the hands of *Woollett* with a trust which he has failed to perform, the Plaintiffs, upon the ordinary principle applicable to trust property, are now entitled to recover them from the hands of *Woollett's* assignees: *Ex parte Dumas* (a), *Ex parte Oursell* (b), *Tooke v. Hollingworth* (c), *Toovey v. Milne* (d), *Thorpe v. Thorpe* (e), *Moore v. Barthrop* (g), *Ex parte Aiken* (h), *Buchanan v. Findlay* (i), *Ex parte Prescott* (k), *Ex parte Copeland* (l),

In

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(a) 1 *Atk.* 232.

(b) *Amb.* 297.

(c) 5 *T. R.* 215.

(d) 2 *Barn. & Ald.* 683.

(e) 3 *Barn. & Adol.* 580.

(g) 1 *Barn. & Cress.* 5.

(h) 2 *Mad.* 192.

(i) 9 *Barn. & Cress.* 738.

(k) 3 *Deac. & Ch.* 218.

(l) 3 *Deac. & Ch.* 199.

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In *Bent v. Puller* (a) there was this broad distinction, that the bills did not remain in specie, but had actually been negotiated; but the authority of the case itself is extremely doubtful, it having been determined before the law on this subject had been much considered, or well settled. The case of *Ex parte Thompson* (b), was subsequently reversed by the Lord Chancellor on appeal, under the name of *Ex parte Benson*. (c)

Mr. Wigram, in reply.

March 18.

The LORD CHANCELLOR.

In the transactions between the foreign merchants and the *London* house, it appears that two bills, viz. one for 1000*l.*, and another for 50*l.*, were remitted to the *London* house by the foreign merchants; and the question is, whether these two bills belong to the assignees of the *London* agent, or to the foreign merchants.

The law on this subject is laid down with sufficient clearness in the cases of *Thompson v. Giles* (d), *Ex parte Pease* (e), *Ex parte Smith in the matter of Power* (g), and *Ex parte Frere in the matter of Sikes* (h), the result of which is, that unless there be a contract to the contrary, if a person, having an agent elsewhere, remits to him, for a particular purpose, bills not due, and that purpose is not answered, and then the agent carries them to account, and becomes a bankrupt, the property in the bills is not altered, but remains in the party making the remittance.

That

(a) 5 T. R. 494.

(b) 1 Mont. & Mac. 102.

(c) 1 Mont. & Bligh, 120.

(d) 2 Barn. & Cress. 422.

(e) 19 Ves. 25. 1 Rose, 232.

(g) Buck, 355.

(h) 1 Mont. & Mac. 265.

That of course may be regulated by usage, but *prima facie*, without special contract, the presumption is, that the bills are received by the agent for the purpose of indemnifying him against any eventual loss, and are not to be dealt with as his own, and immediately converted into cash.

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In *Ex parte Smith in the matter of Power* (a) a bill of exchange was remitted with a direction "to do the needful," which was construed not to give the house to which it was remitted a right to sell the bill, but only a right to keep it until the time arrived, when it was properly payable. Unless, therefore, there is to be found, in the correspondence in this case, a special contract authorising the *London* agent to deal otherwise with the bills, viz. to make them immediately his own, he would be bound to keep them until they became due.

In the course of these transactions a number of letters passed between the parties, some few of which I shall refer to for the purpose of shewing what really was the contract between them. Among others I find a letter dated the 29th of *July* 1836, from the *London* house to the foreign merchants. [His Lordship read the letter.] Now the expression "to cover us in due time," can only mean that funds should be sent in due time to meet the obligation into which the writers had entered by accepting the bill referred to in the letter.

There is another letter from the foreign merchants to the *London* house, dated the 8th of *August* 1836. [His Lordship read this letter also.] Here the remitters, *Jombart and Co.*, request the *London* agent to carry the 300*l.*, due on the 13th of *September*, "to the credit of"

(a) *Buck*, 355.

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of" his account. That expression is ambiguous. It might mean either that the bill or that the money should be carried to the credit of the account; but it is obvious that if the bill had been discounted, there would not be 300*l.* to be carried to the credit of the account, because the amount would be diminished by the sum paid for discount.

[The LORD CHANCELLOR then read the letters of the 11th, 23d, and 26th of *August*, and proceeded:—]

In the letter I have last read we have the identical expression, "do the needful," which occurred in *Ex parte Smith*, but explained, as it was not in *Ex parte Smith*, by the clause which follows:—there, without any such explanation, it was held that as the bills were remitted for a particular purpose which affected them with a trust, they did not pass to the assignees; whereas here, the writer explains what he means by "doing the needful," that is to say, passing the bill to the credit of the remitters as soon as received.

There is then another letter from *Woollett* and Son dated the 17th of *October*, in these words, &c. [His Lordship read this letter.]

In order to make good the title of the assignees, and to displace the title of the remitters of the bills, it would be necessary to establish, from the correspondence, a contract entitling the *London* house to make the bills their own. The cases shew, that unless there was such a contract, the *London* house were agents only for receiving the amount of the bills when due. Instead of containing any authority to the *London* agent to deal with the bills as his own, the correspondence proves the very reverse to have been the understanding of both parties

parties. The only obligation of the foreign house, was to keep the *London* agent in cash to meet the bills when due. It was not intended to establish a cash balance in his hands.

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Another question might have arisen which it is not necessary for me to decide, because there are facts enough to enable me to dispose of the case independently of it. It is obvious that these remittances were made for the purpose of meeting certain obligations; those obligations were not met; so that the condition upon which the bills were remitted has not been performed; and the *London* agent, therefore, it may be said, has not done that which was requisite to complete his title. This, however, is a consideration into which I am not now called upon to enter.

Here are the bills not disposed of, not discounted, and the obligation not performed. I think, therefore, that the foreign house have clearly established their title. The motion to discharge the Vice-Chancellor's order must be refused with costs.

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BETWEEN

May 6. 27. 31. Sir JOHN CAMPBELL, Knight, His Majesty's
ATTORNEY-GENERAL, at the Relation of
SAMUEL BIGNOLD, - - Informant,

AND

The Mayor, Aldermen, and Burgesses of the Borough
and City of NORWICH (otherwise the Mayor,
Aldermen, and Citizens of the City of NOR-
WICH), THOMAS OSBORN SPRINGFIELD,
THOMAS BRIGHTWELL, PETER FINCH,
HENRY WILLETT, and THOMAS ED-
WARDS, - - - Defendants.

A Plaintiff
seeking to
charge a party
with the con-
sequences of
a breach of
trust, is bound
so to state his
case upon the
bill that the
circumstances


THE information stated, in substance, that by virtue
of the 5 & 6 W. 4. c. 76. (the Municipal Corpor-
ation Act), the corporation known by the name of the
Mayor, Sheriffs, Citizens, and Commonalty of the City
of *Norwich*, named in one of the schedules to the act,
became
alleged, if proved, must necessarily and at all events constitute a breach of trust.

Where, therefore, an information was filed, alleging that certain payments,
charged to be illegal and improper, were about to be made, by a municipal cor-
poration, out of the corporate funds, and praying that the corporation might be
restrained from making them, but the payments were of such a kind that, under
certain circumstances, the existence of which was not negatived by any statements
in the information, they might be justifiable, a demurrer for want of equity was
allowed.

Where persons intrusted with the administration of a fund have incurred legiti-
mate and proper expenses in performing duties thrown upon them by their fidu-
ciary situation, they have a right, both at law and in equity, to reimburse them-
selves out of the funds in their hands, without any special provision to that effect.

Seemle; A municipal corporation is justified in discharging, out of the corporate
funds, the expenses of opposing *quo warranto* informations against individual mem-
bers of the corporation, if the object of such informations be to impeach the title,
or destroy the legal existence of the corporation, as a body.

became subject to the several provisions of that act, and among others to the provisions hereinafter set forth; and that a mayor, aldermen, and councillors of the city having been in fact elected under those provisions, the name of the corporation became changed; and the name thereupon taken, and thenceforward commonly used by such corporation has been and is that of the Mayor, Aldermen, and Burgesses of the Borough and City of *Norwich*, and the persons actually elected and being and claiming to be rightfully the mayor, aldermen, and councillors for the time being, have acted and do now act as such corporation, and have taken upon themselves to exercise, and do exercise all rights and powers incident thereto, and have taken upon themselves to administer, and do now administer the funds and property of the said city or borough; but whether the correct name which such corporation ought to bear is not that of the Mayor, Aldermen, and Citizens of the City of *Norwich*, was submitted to the consideration of the Court.

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 v.
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The information then set out the fifty-ninth section of the act, by which it is enacted, that the treasurer of any borough shall pay no money on account of the mayor, aldermen, and burgesses of such borough, save only in such case as is provided by the act, or upon the order in writing of the council, signed by three or more of its members, and countersigned by the town clerk, or by order of the Court of Sessions of the Peace for the borough, or of a justice of the peace for the borough in the discharge of his judicial duty, or in such other cases as therein mentioned or provided for.


The information then set out the ninety-second section, which, in substance, enacts, that after the election

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of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all monies, dues, chattels, and valuable securities belonging or payable to the corporation, or to any of its members or officers in their corporate capacity, and every fine or penalty for any offence against the act (the application of which has not been already provided for), shall be paid to the treasurer of the borough, and shall be carried by him to the account of a fund to be called "the borough fund," and such fund, subject to the payment of such lawful debts of the corporation as shall have been contracted before the passing of the act, or of so much of the principal or interest thereof as the council shall from time to time deem expedient, and saving the rights and claims of all persons or bodies corporate, in or upon the real or personal estate of the corporation by virtue of any proceedings already instituted, or thereafter to be instituted, at law or in equity, or by virtue of any mortgage or otherwise, shall be applied towards the payment of the salary of the mayor, and of the recorder, and of the police magistrate, when there is a recorder or police magistrate, and of the respective salaries of the town clerk and treasurer, and of every other officer whom the council shall appoint; and also towards the payment of the expenses incurred from time to time in preparing and printing burgess lists, ward lists and notices, and in other matters attending the elections mentioned in the act; and in boroughs having a separate Court of Sessions of the Peace, towards the expenses of the prosecution maintenance and punishment of offenders, and towards such other sum to be paid by such borough to the treasurer of the city as thereafter provided, and towards the expense of maintaining the borough gaol, house of correction, and corporate buildings, and towards the payment of the constables, and of all other expenses

expenses not therein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of the act; and in case the borough fund shall be more than sufficient for the purposes aforesaid, "the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants, and improvement of the borough."

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 of
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And in case the borough fund shall not be sufficient for the purposes aforesaid, the council is thereby authorised, from time to time, to estimate what additional sum will be required for the payment of the expenses to be incurred in carrying into effect the provisions of the act, and to raise the requisite amount by a borough rate in the nature of a county rate, to be made within their borough; and certain powers are for that purpose vested in the council, as therein mentioned. And all sums, levied in pursuance of such borough rate, shall be paid over to the account of the borough fund, and, subject to the provisions thereinbefore contained, shall be applied to all purposes to which a borough rate was theretofore applicable.

The information then stated that the Defendant *Springfield* was in fact elected, and thereupon became ostensibly, and claimed to be rightfully, and acted as mayor of the city; but that he had lately ceased to be such mayor, and was then one of the councillors thereof. That the Defendant *Brightwell* was in fact elected, and thereupon ostensibly became, and had acted, and then claimed to be rightfully, one of the aldermen of the city, or borough and city, and had since been in fact elected, and thereupon ostensibly became, and had since acted as, and then claimed to be rightfully, the mayor of the city. That the Defendant

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Edwards had been in fact appointed, and was then ostensibly, and claimed to be rightfully, the treasurer of the city, under the provisions of the act.

The information further stated, that at a meeting of the council, on the 19th of *August*, 1886, certain resolutions were passed, and entered in the minute book of the council's proceedings. It then set forth the resolutions, which were to the effect, that the council do adopt the petition now in course of presentation to the Lord Chancellor by the mayor and other members of the council, for the appointment of trustees to the several city charities, lately under the management of the former corporation; and that the town clerk be instructed to procure an order of the Lord Chancellor in conformity with the prayer of such petition, and be also empowered to attach the city seal to the same; that the mayor and the Defendants *Finch* and *Willett*, together with the town clerk, be a deputation to proceed to *London*, for the purpose of furthering the objects of the petition, with power to employ attorneys and counsel as they may think necessary, and that the town clerk be authorised to take such corporation books and documents as he may deem necessary, and to take the opinion of counsel on any points touching the charities, or the charity estates, as he may be advised.

The information then stated that at a subsequent meeting of the council, on the 23d of *September*, 1886, a resolution was passed, and entered in the minute book, by which it was in substance resolved, that the authority given to the deputation, appointed by the former resolution of the council, be continued; and that the town clerk be ordered to take all requisite proceedings for carrying into effect the resolutions and orders of the council,

council, touching the appointment of charity trustees ; whereupon Mr. Councillor *Bignold* moved, as an amendment, seconded by Mr. Councillor *J. Steward*, that the said resolution be not adopted ; which amendment, on a shew of hands, was negatived by a large majority, and the original resolution adopted.

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The information then stated that by a rule of the Court of King's Bench, dated the 4th of *November* 1836, it was ordered that *Monday* the 14th of *November* then instant, should be given to the Defendant *Springfield*, to shew cause why an information, in the nature of a *quo warranto*, should not be exhibited against him, to shew by what authority he claimed to be mayor of the city of *Norwich* on the grounds therein stated. That by another rule of the Court of King's Bench, of the same date, it was ordered that *Monday* the 14th of *November* should be given to the Defendant *Brightwell*, to shew cause why an information, in the nature of a *quo warranto*, should not be exhibited against him, to shew by what authority he claimed to be an alderman of the city of *Norwich*, on the grounds therein stated. That after these two rules had been served on the Defendants *Springfield* and *Brightwell* respectively, and, in consequence thereof, a meeting of the council was holden on the 11th *November*, 1836, at which resolutions were passed, and entered in the minute book, to the following effect : — That the town clerk be directed to adopt the necessary measures for shewing cause against the rules *nisi* obtained by *Samuel Bignold* and *Henry Rogers*, for informations *quo warranto* against the Defendants *Brightwell* and *Springfield*, members of the council ; and that the city treasurer be authorised to pay from time to time to the town clerk, out of the city funds, such sums of money as the city committee shall think requisite for defraying the law expenses and disbursements

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~~Attorney-~~
~~General.~~


^{a.}
The Mayor of
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bursaments attending such shewing cause; such orders to be signed by three members of the committee.

The information then stated that the Defendant *Willet*, who was a councillor of the city, proposed and voted for the resolutions passed at the last-mentioned meeting; and that the Defendants, *Springfield*, *Brightwell*, and *Finch*, were present at the meeting, and voted as councillors in favour of, or otherwise supported and promoted the making of the same; and that they were also present and voted in favour of, or otherwise supported and promoted the making of the before mentioned resolution of the 23d of *September 1836*. That on the 24th of *November 1836*, the rule of the 4th of *November* against the Defendant *Brightwell*, was made absolute, and the rule against the Defendant *Springfield*, was enlarged to the then next term. That the town clerk had acted as the attorney for the Defendants *Springfield* and *Brightwell* in the matter of these rules, by the express direction and under the sanction of the council, or of divers members thereof, including the last-mentioned Defendants, and upon the authority of the resolutions; and that the town agents of the town clerk had retained counsel on behalf of those Defendants, to shew cause against the rules.

The information charged, that if no order in writing had hitherto been made and signed for the payment by the city treasurer of any sum of money to the town clerk on account of the costs and expenses of the Defendants *Springfield* and *Brightwell* in the said matters, or if no part of the property or funds of the corporation had hitherto been applied to such purpose, as to which the relator was ignorant, yet that the mayor, aldermen, and burgesses or citizens, or the majority of the council, in the interest of, and of the same political party as, the Defendants

Defendants *Springfield* and *Brightwell*, and the last named Defendants, as members of the council, and others of their political party had given out that they intended, and they did, in fact, wrongfully intend, to make and sign, or procure to be made and signed, by the competent parties, the requisite orders, directing the treasurer to pay to the town clerk out of the city fund, or otherwise in some manner to raise and provide out of the funds or property of the corporation, all such sums as should be required to satisfy the costs, fees, and disbursements already or hereafter to be incurred, in respect of the aforesaid proceedings in the Court of King's Bench.

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The information further stated, that on the 19th of *August* a petition was preferred to the Lord Chancellor by the town clerk as the solicitor of the corporation, for the purpose of having trustees appointed to the charities of the city, which petition had for its object, to procure the appointment, as such trustees, of persons nominated by the majority of the council, such persons being active political partisans, and of the same political principles with such majority, or of whom the Defendants *Springfield* and *Brightwell* were the principal and active leaders, and which petition was the petition so adopted by the council, as before mentioned. That afterwards, in the same month of *August*, the Defendants *Springfield*, *Finch* and *Willett*, and the town clerk, in pursuance of the resolutions, came from *Norwich* to *London*, and remained there at an hotel for several weeks, for the alleged purpose of attending to the proceedings for the appointment of such trustees; and that very considerable costs and charges had been incurred for their travelling and other expenses, which costs and charges had not been paid and defrayed, and were not intended to be paid
 and

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and defrayed by them personally, but were, in fact, paid by the town clerk, or yet remained unpaid, upon some understanding, that the same should be repaid to him, or otherwise defrayed out of the city fund or other property of the corporation.

The information charged that the mayor, aldermen, and burgesses, or the majority of the council in the interest of, and of the same political party as the said Defendants *Springfield, Brightwell, Finch, and Willett*, intended to make and sign, or procure the proper parties to make and sign the requisite order of the corporation, directing the city treasurer to pay out of the city funds, or otherwise to raise out of the funds of the corporation, the requisite sums to defray the last-mentioned costs, charges, and expenses.

The information charged, that such intended applications of the city funds or property were altogether wrongful, and directly contrary to the provisions of the Municipal Corporation Act, and in breach of the obligations of the corporation, as trustees of the funds and property for the benefit of the citizens and inhabitants at large of the city; and that the corporation ought, therefore, to be restrained by injunction from making such payments; and that in case any sums had been already paid, the same ought to be refunded, and the costs of the relator paid by such members of the council as had concurred in the resolutions.

The information prayed a declaration accordingly, and that the Defendants, the mayor, aldermen, and citizens of *Norwich*, the Defendants *Springfield, Brightwell, Finch, and Willett*, and all other the aldermen and councillors of the city, might be restrained by injunction from making and signing, or procuring to be made and signed,

signed, any order directing the city treasurer, out of the city or borough fund, or out of any funds or property belonging to the corporation, to pay any sums of money towards satisfaction of any costs, charges, or expenses incurred in respect of the before-mentioned proceedings in the Court of King's Bench, and in the Court of Chancery; and that the Defendant *Edwards*, as treasurer, might be restrained from making any such payments; and that in case any sums of money had been so applied, out of the city or borough fund, or other the funds or property of the corporation, the same might be refunded, and that the Defendants *Springfield*, *Brightwell*, *Finch*, and *Willett* might personally pay the costs of the suit.

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To this information the Defendants, the mayor, aldermen, and burgesses of *Norwich*, and the Defendant *Edwards*, filed a joint and several demurrer for want of equity; and a similar demurrer was also filed by the other Defendants *Springfield*, *Brightwell*, *Finch* and *Willett*. The demurrers were argued at the Rolls on the 19th and 20th of *December* 1836; and on the 13th of *January* following, Lord *Langdale* gave judgment, allowing both the demurrers. (a)

An appeal was now brought against the order of his Lordship allowing the demurrer of the first-mentioned Defendants.

The case was principally argued upon the effect of the different sections in the Municipal Corporation Act, in converting the town council of the cities and boroughs named in the act into trustees amenable to the jurisdiction of the Court of Chancery, in respect of the administration of the borough fund, and upon the nature and

(a) 1 *Keen*, 700.

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and object of the proceedings, the payment of the costs of which, out of the corporate funds, was impeached by the information, as constituting a breach of trust on the part of the Defendants. The only cases cited in support of the information were *The Attorney-General v. Brown (a)* and *The Attorney-General v. The Mayor of Liverpool (b)*. The arguments upon the frame and effect of the information in point of pleading, are fully stated and considered in the judgment.

Sir *W. Follett*, Mr. *Wigram*, and Mr. *O. Anderdon*, for the information.

The Solicitor-General, Mr. *Jacob*, and Mr. *Booth*, in support of the demurrer.

May 31.

The LORD CHANCELLOR.

The Master of the Rolls decided this case, not upon any judgment which he had formed on the construction of the act of parliament, but on the ordinary technical rules of pleading, and I therefore give no opinion as to the many important subjects which were discussed before me. The Master of the Rolls thought that the information did not state such a case as entitled the relator to resist the demurrer; and, although his Lordship is supposed to have thrown out some observations as to the general jurisdiction of the Court, he distinctly stated that his judgment did not proceed upon that ground, but entirely on the ordinary rules of pleading, because he did not find allegations in the information, which, according to his view, would give the Court jurisdiction.


If the relator had really a case to state, one is a little surprised at the course which he has here pursued.

Instead

(a) 1 *Swan*, 265.

(b) 1 *Mylne & Craig*, 171.

Instead of amending his information, and so stating the case as to call for the judgment of the Court on the merits, he has thought proper to appeal, as of course he was at liberty to do, from the judgment of the Master of the Rolls, pronounced upon the mere question of pleading.

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I make this observation, because, although the matter was not opened to me, it was intimated that a motion for an injunction was pending, a circumstance which has made me look more closely into the case than I otherwise should have done. Without knowing what the nature of that application might be, whether resting on matter of form or on merits, it gave me reason to suppose there was a case to be brought before the Court, grounded on the supposed danger to the corporation fund. If the relator has lost the opportunity of bringing forward that case in the suit, it is not in consequence of the order of the Master of the Rolls, or of the course which I may adopt on the appeal from his Lordship's order. The order allowing the demurrer was pronounced more than four months ago; and yet, notwithstanding that the relator knew that in the view taken by the Master of the Rolls, the information did not state a case which enabled the Court to give a judgment on the merits, he thought it right to bring the same case by appeal before me. If, therefore, any injury arises to the fund in consequence of the demurrer being now finally allowed by my affirming the judgment of the Master of the Rolls, it is a result of which the relator cannot very well complain.

The information, after setting out the fifty-ninth and the ninety-second sections of the act, states in a very peculiar manner the legal existence of the present corporation. It was said, and was very much insisted upon
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in the argument, that the present relator was a member of the corporation, and, therefore, though he might have good reason for displacing certain individuals from the corporation, he could not possibly have any object in destroying the corporation as a body. It may be so; but if it be, the title of the corporation of which the relator is said to be a corporator is very singularly expressed upon the face of the information: — “ And the persons acting, elected, and being and claiming to be rightfully the mayor, aldermen, and councillors of the said city or borough of the said city for the time being, have acted, and do now act, as such corporation or corporate body, and have taken upon themselves to exercise and do exercise all rights and powers of and incidental thereto, and have taken upon themselves to administer, and do now administer the funds and property of the said city or borough and city; but whether the correct name which such corporation or corporate body ought to have taken, and ought to bear, is not that of the Mayor, Aldermen, and Citizens of the City of *Norwich*, is submitted to the consideration of this Court.” The information, therefore, cautiously abstains from giving any credit to the legal existence of the corporation; — a circumstance very material, with reference to that part of the argument which was founded on inferences respecting the object of the proceedings by *quo warranto*, instituted at the relation of the same individual who is the relator here.

It then states, that “*Springfield*, one of the Defendants hereto, was in fact elected, and thereupon became ostensibly, and claimed to be rightfully, and acted as mayor of the said city or borough and city; but the said Defendant has lately ceased to be such mayor, and is now one of the councillors thereof.” That statement may undoubtedly apply to the individual:

it

it does not challenge the title of the corporation : but, although the information designates the mayor, aldermen, and burgesses, by their corporate name under the act of parliament, a doubt is suggested whether the corporation ought to have assumed the name which the act of parliament directs shall be their corporate title. The statement is, that "they have taken upon themselves, and claim to be rightfully the mayor, aldermen, and councillors of the city or borough of the city for the time being, and have acted, and do now act as such corporation." One cannot doubt that there is some reason or other, upon which it is impossible for me to speculate, why the relator thinks proper to abstain from giving to the corporation a valid legal existence on the face of the information. Then follows the same allegation with regard to Mr. *Brightwell*, "that he was in fact elected, and thereupon ostensibly became and has acted as, and now claims to be rightfully one of the aldermen of the said city."

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Having so stated the existence of the corporation, and the election of those two members of it, the information proceeds to set out the resolution of the council. [His Lordship read the resolution of the 19th of *August* 1836.] Some argument was raised, whether the corporation had not unnecessarily introduced themselves into the petition which had been prepared for presentation by other parties. No doubt is suggested as to their having properly approved of that proceeding. The petition was presented in the name of the mayor and another officer of the corporation, and when the council met, they approved and adopted it ; the petition was then ordered to be prosecuted, and an order of the Lord Chancellor to be obtained upon it, and the city seal to be attached to it. The resolution was come to after the council had been regularly summoned, and the effect of it was to make the

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of the council, for the purpose of
 of the charity funds. By
 of the 23d of *September*, the proper
 were ordered to take all
 for the purpose of carrying the

then goes on to state the proceedings
 informations against *Springfield* and
 that is stated on that subject is "that
 rule or order of his Majesty's Court of
 at *Westminster*, dated the 4th of *November*
 was ordered that *Monday* the 14th of *No-*
 should be given to the Defendant *Spring-*
 cause why an information in the nature
warranto should not be exhibited against him,
 by what authority he claimed to be mayor of
 of *Norwich*, on the grounds therein stated;" —
 setting forth the grounds upon which the title of the
 was to be impeached, but merely alleging the
 of the application for the *quo warranto*, and of
 the order *nisi* to shew cause having been granted. A
 similar allegation is made as to *Brightwell*, who was an
 alderman.


The information goes on to state, that there was a
 meeting of the council on the 11th of *November* 1836,
 at which the following resolutions were passed.

[His Lordship read the resolutions, and having stated
 the subsequent allegations and charges at length, pro-
 ceeded as follows:] —

Throughout the whole of this information, then, there
 is the most general statement of the proceedings against
 these two individuals, *Springfield* and *Brightwell*: there

is


is no statement of the ground on which their title is impeached; no allegation that the case only affects themselves individually: but, from the nature and terms of the information, the mode in which the title of the corporation is stated (of course looking only to the language used in the information,) almost amounts to a statement that the relator at least questioned the legal existence of the corporation itself. It is not stated in this information that that was the object of the *quo warranto*; but it is quite sufficient in the view I take of the case, that there is no allegation that it was not a proceeding for the purpose of attacking the legal existence of the corporation.

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On the other part of the case, with respect to the charity petition, there is an allegation, that certain proceedings under a charity petition were adopted by the corporation, and that those proceedings have been attended with considerable expenses; and that the council intend to pay such expenses out of the corporation fund.

With regard to the fund out of which the expenses are alleged to be about to be paid, the language is as large and as general as it is possible for language to be. The allegation is, that such intended application of the funds or property of, or vested in the corporation, to such before mentioned ends, purposes, and objects respectively, or any of them, "is altogether wrongful, and directly contrary to the clear and express provisions of the said Act of Parliament, and in breach and violation of the duties or obligations of the said mayor, aldermen, burgesses or citizens, as trustees of the funds and property of the said corporation for the benefit of the burgesses or citizens, and inhabitants at large of the said city." There is no allegation of any intention to pay the

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expenses in question out of any particular fund ; no allegation that such payment will interfere with any of those claimants who are directed to be paid out of the fund in the first instance : the statement is merely of an intention to pay out of some fund or other belonging to the corporation.

Now there are two parts of the case material to be considered, which are, the generality of the allegations with regard to the object of the *quo warranto* informations, and the generality of the allegations with regard to the nature and circumstances of the fund out of which the expenses are proposed to be paid. I quite agree with the Master of the Rolls, that if a statement is made by a Plaintiff, which is in itself so ambiguous that in one sense it would not, and in another it would, amount to a charge of breach of trust, you are not at liberty, upon a demurrer, to adopt the unfavourable interpretation, and to extend the meaning of the allegation beyond that which the Plaintiff has himself stated on the record ; and that by the rules of pleading, in putting a meaning on doubtful expressions, the presumption is rather against the party pleading, than the party who objects to the language of the pleading. (a) If, for instance, the allegation in a bill is, that two funds are in the possession of the Defendant, a trustee, one of which might, and the other could not, be legitimately applied in a particular mode ; and that the Defendant, having those two funds, intends to make a payment, which, if paid out of the one fund, would be a breach of trust, but which would not be a breach of trust if paid out of the other, it is never presumed, on a general allegation of that description, that the payment is intended to be made out of that fund which could only be dealt with by a breach of trust.

(a) See *Vernon v. Vernon*, p. 145. *supra*.

trust. On the contrary, the presumption is, that what is intended to be done, is intended to be rightfully and properly done, provided there are circumstances enabling the party to do that properly, which it is alleged he intended to carry into effect.

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In considering this information, therefore, unless I can come to the conclusion that under no possible circumstances it would be proper for the trustees to pay the expenses of the charity petition out of the corporate funds, or to make payments out of those funds for any expenses incident to the opposition to *quo warranto* informations contesting the corporate character of members of the corporation, nothing stated in this information calls for any judgment from me on the questions which have been discussed upon the construction of the act of parliament. So strongly was it felt, indeed, that there might be cases in which the corporation would be justified in making these payments, that Sir *William Follett*, in his reply, was driven to use this argument, that if any particular circumstances did exist, it was for the Defendants, in their own justification, to state and explain them in their answer; and that it was sufficient for the relator to make a *prima facie* case. That is contrary, however, to the known and established rules of pleading. It is for the Plaintiff to allege the grievance of which he complains; and if he does not on his record sufficiently allege it, the Defendant is not called upon to answer at all. If the case, as stated on the record, brings before the Court allegations on which two constructions may be fairly put, one consistent with the innocence of the Defendant, and the other implying a breach of trust on his part, it is contrary to all the rules of pleading to presume that that is wrong which the Plaintiff has not thought proper to allege as wrong, by not

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setting forth those circumstances which are necessary to make it so.

Now, when I look at the ninety-second section of the act upon which this question turns, and consider what sort of case is consistent with the allegations in this information, I have no doubt whatever that the Master of the Rolls came to a right conclusion on this record. The corporate fund is, by the effect of this section, put under the direction of the council, and, subject to the payment of debts, it is to be applied to the several purposes therein specified. [His Lordship read the words of the section.]

Independently of the provisions of this section, I apprehend it to be quite clear, according to the rule which applies to all cases of trust, that if necessary expenses are incurred in the execution of a trust, or in the performance of the duties thrown on any parties, and arising out of the situation in which they are placed, such parties are entitled, without any express provision for that purpose, to make the payments, required to meet those expenses, out of the funds in their hands belonging to the trust. Such is the rule of this Court, and such also is the rule at common law. The cases of *The King v. The Inhabitants of Essex* (a), and *The King v. The Commissioners of Common Sewers* (b), establishing the principle at law, are more applicable to this question than most of the cases in this Court usually referred to as authorities upon the subject. The Defendants in those two cases were public officers, who, having public duties to perform under the authority of acts of parliament, were held to be entitled to pay expenses legitimately and properly incurred, out of the funds

(a) 4 T. R. 591.

(b) 1 Barn. & Adol. 232.

funds of which they were by act of parliament constituted trustees.

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The rule, therefore, both at law and in this Court, certainly does not require any special provision to be made for the case, provided the expenses are such as have been legitimately and properly incurred by the persons intrusted with the administration of the fund. But the clause in this act of parliament goes on, and after providing that the council shall be at liberty to pay all other expenses not otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of the act — which cannot merely mean expenses to carry into effect that which must be done to set the act of parliament in operation, but must mean also those expenses which would arise out of the duties imposed on the parties by the act — it goes on to say, that the surplus shall be applied, under the direction of the council, for the public benefit of the inhabitants and improvement of the borough; — a very large discretion, undoubtedly, and like every other discretion given for public purposes, to be honestly and faithfully exercised.

In the view I take of the case, it is impossible not to observe that, in the charge of the mischief to arise from the alleged payment, the information almost borrows the very words of the ninety-second section, with respect to the application of the surplus; for the information charges the Defendants as “ trustees of the funds and property of the said corporation, for the benefit of the burgesses, citizens, and inhabitants at large of the said city,” the terms in the act being, that the surplus “ shall be applied under the direction of the council, for the public benefit of the inhabitants and improvement of the borough.” Now there is no allegation that there is not a surplus: the inference rather to be collected from what is stated, is, that

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there is a surplus. I do not, however, proceed upon that; what I do proceed upon is this, that there is no allegation that the payments in question will interfere with the payments which are directed to be made by the ninety-second section; but a mere allegation, in terms the most general, that there is an intention, on the part of the council, to make those payments out of some property, in the hands of the council, belonging to the corporation.

Nothing which is not distinctly alleged is to be inferred in favour of the case stated by the information. The information must state a case which shews a breach of trust, and not merely a case which, coupled with something not alleged, would amount to a breach of trust. If, therefore, I see that, under the circumstances, it may be consistent with the case stated, that that which is intended to be done may be legitimately and properly done, there is no ground, in this information, for the interference of the Court, and, consequently, the demurrer must be allowed.

In determining whether or not the information has failed to state that which amounts to a breach of trust, I have to consider whether, according to the construction of the ninety-second section, there may not be a case quite consistent with what appears on the face of the information, and which would not be a breach of trust. Now, addressing myself to the proceedings on the *quo warranto* informations, to which certainly by far the strongest part of the relator's argument is directed, I will suppose a case which, though not alleged on the face of the information, is perfectly consistent with every thing that is there alleged; I will suppose that, on some ground or other, (the information does not state what) the title of Messrs. *Springfield* and *Brightwell* is impeached, and that the
same

same question which is raised to affect the title of those two individuals would affect the legal existence of the corporation itself. It was said, indeed, that a mode of proceeding might be adopted which would at once challenge the title of the whole corporation. That may be so; but it is quite clear that another course of proceeding may be adopted for the same purpose, and that the question, though raised as to the right of an individual, may have for its object to impeach the title of every member of the corporation, or of so many of them as would destroy the legal existence of the corporation. There is no allegation that it is not so here. The information carefully abstains from giving the grounds on which the proceeding was instituted. When, however, I find the proceeding so stated as applicable to particular individuals, and coupled with the statement as to the whole corporation, that the mayor, aldermen, and burgesses, or the persons claiming to be rightfully mayor, aldermen, and burgesses, have, in point of fact, assumed the powers and jurisdiction of the corporation, that comes very near to a statement that the character of the whole corporation is challenged. It is said there is no allegation of that kind. I am not inquiring whether on the face of the information it is so alleged or not; but whether the detail of the circumstances which may very possibly exist be inconsistent with that which appears on the record. Instead of being inconsistent with it, I find it much more consistent with it than the case which the relator's argument assumes, namely that the information intended to state that the object of the *quo warranto* informations is to attack the title of these two individual corporators only.

Suppose the case of an objection set up in the Court of King's Bench, the effect of which would be, if prosecuted

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cuted with success, to destroy the corporation. In the argument it was said, that if there were no legal corporation, there could not be a more legitimate question to raise. That is perfectly true; but there is another supposition, which is, that the corporation was perfectly legally constituted, and that there was no real foundation therefore, for the application for the *quo warranto* informations on which the title of the corporators is sought to be attacked. Is it to be said that under the ninety-second section, if an attempt is made to destroy the legal existence of the corporation, and the corporation have surplus funds, applicable, under the direction of the council, for the benefit of the inhabitants (who must, of course, be considered interested in the corporation of the town of which they are inhabitants), it is an improper application of the surplus funds to defend proceedings on *quo warranto* informations, having for their object to destroy that corporation of which the individuals attacked are members, and which is the trustee of the very fund stated by the information to be held for the benefit of the public? If, under these circumstances, it would not be illegal in the corporation to defend the body of which they are members, against unfounded proceedings by information in the nature of a *quo warranto*, such a state of things is quite consistent with what is alleged on the face of the information, and nothing is stated upon this record which would amount to a breach of trust.

Such being my view of the allegations with respect to the *quo warranto* informations, it is hardly necessary for me to say a word with regard to the charity petition, which appears to me to have been presented for a most legitimate purpose, and prosecuted in a most proper mode. The matter was one in which the corporation naturally felt themselves bound to interfere. Municipal corporations

corporations were, and in many cases are now so much implicated in the trusts, and have so deep an interest in the property out of which the charity fund is derived, that they would seem to be necessary parties to any proceeding for the purpose of appointing new trustees. In many cases, corporations, in their corporate character, possessed property on which were charged certain payments for charitable purposes. At all events, there existed charity funds which were vested in the corporations within the meaning of the seventy-first section of the act, and were intended to be separated from the other corporate funds. That separation, however, had not taken place, and in the mean time the documents and every thing else belonging to the property remained with the corporation, until they should be separated by means of the proceeding for the appointment of new trustees. The trust had ceased, by expiration of time, on the 1st of *August* last. Nothing else was done; there were no trustees; the property and the muniments remained exactly where they were; and above all, the corporation, who represented the inhabitants of the town at large, had, in most cases at least, a very important interest on behalf of the public, in protecting the charity, and seeing the appointment of proper persons to be trustees of the charity funds. Will it be said, that if the corporation has a surplus of the corporate funds in their hands, to be applied according to their discretion to the public benefit of the inhabitants, they can more legitimately and properly exercise that discretion, than in seeing that those charity funds are entrusted to persons who will properly administer them? The charity funds are, in fact, the property, and were given for the benefit of the town, of which the members of the corporation are the representatives.


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If I were to over-rule this demurrer, I must come to the conclusion that, under the circumstances, it would
necessarily

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necessarily be a breach of trust in the corporation to apply any part of the surplus income in their hands for that purpose. I think it is impossible to come to that conclusion; and I am of opinion, therefore, that the Master of the Rolls was fully justified in the view which he took, and in the ground upon which alone he decided, namely, that there is not on this information what amounts to a sufficient allegation of a breach of trust.


I leave the question upon the merits totally untouched. I am very glad that the case is in a position which enables me satisfactorily to myself to dispose of this appeal, without touching on any of the points of law which have been argued at the bar. The time may come when those important points may legitimately be discussed, and when it may be necessary to decide them. For the present purpose, I found my judgment, as the Master of the Rolls did his, on the absence of any allegation in this information, which raises any such case for argument.

It is supposed, that the Master of the Rolls threw out some observations as to the jurisdiction of the Court over these funds. I abstain from entering into that subject at all. If I were of opinion that under no circumstances the Court had jurisdiction, I should of course allow the demurrer without adverting to the particular circumstances of the case; but I find particular circumstances which are quite sufficient to support the judgment of the Master of the Rolls, and upon these the judgment which I have now given is founded.

Mr. *Wigram* having applied for liberty to amend,

The LORD CHANCELLOR refused the application, observing, that whatever might be the merits behind, this
 was

was an appeal on a matter of form. If there really were merits in the case, there was no reason why a new information should not have been put upon the file four months ago.

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The *Solicitor-General* then asked for the costs of a motion, of which notice had been given only a week ago, for an injunction to restrain the Defendants from making any payments out of the fund pending the appeal. This motion the informant had *ex parte* obtained leave to make, and would now of course abandon.

The LORD CHANCELLOR at first thought that as the cause was out of Court by the Master of the Rolls having allowed the demurrer, he had no jurisdiction to make any order on the subject. The case of *Deere v. Guest (a)*, referred to in support of the application, was distinguishable from the present in this respect, that there the notice of motion was given while there was a cause depending in court.

After some further discussion, his Lordship having ascertained that the petition of appeal was presented on the 25th of *February* last, and that the object of the motion was to restrain the Defendants from making payments out of the fund, pending the appeal, observed that those circumstances altered his view of the case. He had supposed the motion to be a substantive and independent proceeding; but if, as appeared to be the fact, its sole purpose was to prevent the proposed application until the appeal should be disposed of, it was a proceeding connected with, and growing out of the appeal, and must follow the same fate. Upon these grounds, he thought he was entitled to give the Defendants the costs of the motion.

(a) 1 *Myline & Craig*, 516.

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petition the petition of the council, for the purpose of having trustees appointed of the charity funds. By another resolution, of the 23d of *September*, the proper officers of the corporation were ordered to take all proceedings necessary for the purpose of carrying the object into effect.


The information then goes on to state the proceedings on the *quo warranto* informations against *Springfield* and *Brightwell*. All that is stated on that subject is "that by a certain rule or order of his Majesty's Court of King's Bench at *Westminster*, dated the 4th of *November* 1836, it was ordered that *Monday* the 14th of *November* instant should be given to the Defendant *Springfield*, to shew cause why an information in the nature of a *quo warranto* should not be exhibited against him, to shew by what authority he claimed to be mayor of the city of *Norwich*, on the grounds therein stated;" — not setting forth the grounds upon which the title of the mayor was to be impeached, but merely alleging the fact of the application for the *quo warranto*, and of the order *nisi* to shew cause having been granted. A similar allegation is made as to *Brightwell*, who was an alderman.

The information goes on to state, that there was a meeting of the council on the 11th of *November* 1836, at which the following resolutions were passed.

[His Lordship read the resolutions, and having stated the subsequent allegations and charges at length, proceeded as follows:] —

Throughout the whole of this information, then, there is the most general statement of the proceedings against these two individuals, *Springfield* and *Brightwell*: there is

is no statement of the ground on which their title is impeached; no allegation that the case only affects themselves individually: but, from the nature and terms of the information, the mode in which the title of the corporation is stated (of course looking only to the language used in the information,) almost amounts to a statement that the relator at least questioned the legal existence of the corporation itself. It is not stated in this information that that was the object of the *quo warranto*; but it is quite sufficient in the view I take of the case, that there is no allegation that it was not a proceeding for the purpose of attacking the legal existence of the corporation.

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On the other part of the case, with respect to the charity petition, there is an allegation, that certain proceedings under a charity petition were adopted by the corporation, and that those proceedings have been attended with considerable expenses; and that the council intend to pay such expenses out of the corporation fund.

With regard to the fund out of which the expenses are alleged to be about to be paid, the language is as large and as general as it is possible for language to be. The allegation is, that such intended application of the funds or property of, or vested in the corporation, to such before mentioned ends, purposes, and objects respectively, or any of them, "is altogether wrongful, and directly contrary to the clear and express provisions of the said Act of Parliament, and in breach and violation of the duties or obligations of the said mayor, aldermen, burgesses or citizens, as trustees of the funds and property of the said corporation for the benefit of the burgesses or citizens, and inhabitants at large of the said city." There is no allegation of any intention to pay the

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It certainly was not the intention of the testator, in the present case, that the devise should be revoked by the subsequent conveyance. The contract is for a conveyance to himself, his heirs, appointees, or assigns; and the Court must suppose that the word "appointees" was introduced for the purpose of enabling the purchaser to take a conveyance to himself, to such uses as he should appoint; and his appointee would afterwards take under the deed of conveyance to the purchaser.

The decisions, which have been referred to, have not been considered as entitled to very great weight; their soundness has been impeached by Sir *Edward Sugden* in his *Treatise on Vendors and Purchasers* (a), and in his *Treatise on Powers*. (b) The observations contained in the latter work are entitled to much attention, because the work itself has been rewritten since its author was Lord Chancellor of *Ireland*; and it may, therefore, be supposed that if such a case as the present had come before him as a judge, his decision would have coincided with the opinion he has published.

Mr. *Wigram* and Mr. *Thomas Turner*, for the heir, cited the following cases, in addition to those mentioned by the Appellants' counsel; *Parsons v. Freeman* (c), *Brydges v. Duchess of Chandos* (d), *Williams v. Owens* (e), *Harmood v. Oglander* (g), *Luther v. Kidby* (h), *Kenyon v. Sutton* (i); and they referred to *Roberts on Wills*. (k)

Mr.

(a) Vol. i. p. 179. 9th ed.

(b) Vol. ii. p. 6. 6th ed.

(c) 3 *Atk.* 741. *S. C.* 1 *Wils.*
308. and *Ambl.* 116.

(d) 2 *Ves.* jun. 417.

(e) 2 *Ves.* jun. 595.

(g) 6 *Ves.* 199. and 8 *Ves.* 106.;
and see *Lock v. Foote*, 5 *Sim.* 618.

(h) 3 *P. Wms.* 170. n.

(i) Cited 2 *Ves.* jun. 500.

(k) Pages 251. 269. 276. 298.
ed. 1815.

Mr. *Turner*, for the purchaser.

Mr. *Spence*, in reply.

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The LORD CHANCELLOR.

April 14.

This question arises on a bill for specific performance ; and the question, therefore, is not, strictly speaking, as between persons claiming adversely the property in question, but whether the case is such that the purchaser shall be compelled to take the title. It appears that on the 5th of *October* 1832, a contract was made by the testator for the purchase of the property in question, and it was stipulated that the conveyance should be made to the testator, his heirs, appointees, or assigns.

After this, the testator, who, by this contract, had the equitable title to the property, having already made his will, makes a codicil on the 8th of *October* 1832, in which he states that he devises the lands, so contracted for, to the Plaintiffs, upon trusts for sale.

On the 11th of *April* 1833, the conveyance of the premises took place, and it was taken in this mode, viz., to hold to the testator and his heirs for ever, nevertheless to such uses as he should, by any deed, appoint; and in default of, and subject to such appointment, to the use of the testator for life; and after the determination of that estate, by any means in his lifetime, to the use of a trustee, during the life of the testator, in trust for him and his assigns; and after the expiration or sooner determination of the estates thereby limited, then to the use of the purchaser, his heirs and assigns for ever.

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The case, therefore, is one in which a party, having by the contract the beneficial interest, devises that beneficial interest, and having so devised it, takes a conveyance in the usual form for barring a wife's dower; and the question is, whether the conveyance so taken, does or does not operate as a revocation. It would not have so operated, if the legal interest had been conveyed according to the terms of the contract, or, in other words, if the legal interest had been simply superadded to the beneficial interest.

Now, taking this case as between vendor and purchaser, I have considered whether the authorities so clearly establish that the revocation did not take place, that I could compel the purchaser to take the title. It is said that the will is not revoked, because the contract is, that the estate shall be conveyed to the testator, his heirs, appointees, or assigns; and that, therefore, he has reserved to himself a power of directing the mode in which the conveyance shall be made. But that every purchaser has; for he acquires the dominion over the estate by virtue of the contract; and the real question is, whether, as the authorities stand, the purchaser, by taking the conveyance in the manner which I have already stated, has or has not availed himself of that conveyance, for the purpose of doing something beyond the merely taking a conveyance of the legal estate in the property in which the contract had already given him the equitable interest.

Whether the principle of these authorities is or is not accurate, it is unnecessary for me now to inquire; and it may be expected that the Court will soon be relieved from the necessity of considering such cases as the present, by a very important and a very useful alter-

alteration in the law. (a) But, looking at the law as it now stands, the question, as between the vendor and the purchaser, is, whether the title is such that the purchaser can be compelled to take it.

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Now in *Parsons v. Freeman* (b), as Lord *Alvanley* has said (c), Lord *Hardwicke* establishes this principle, that wherever the estate is modified in a manner different from that in which it stood at the time of making the will, there is a revocation.

Is it possible to say the estate in this case is not modified in a manner different from that in which it stood at the time of making the will?

The purchaser contracted for a conveyance to him, his heirs, appointees, or assigns, because he had a right to direct in what manner the estate should be conveyed.

Lord *Hardwicke* also says, in the same case, "where a man has an equitable interest in fee in an estate, and devises it, and afterwards makes a conveyance of the legal estate to the same uses, this is no revocation;" then afterwards, and in support of the decision to which he came, he refers to *Tickner v. Tickner*, which was a case in which a testator, possessed of an undivided moiety of gavelkind land devised it to his wife in fee; and afterwards, upon a partition being made, had the whole of the land allotted to him, and conveyed to such uses as he should appoint by deed in writing, and in default of such appointment, to him in fee: and that conveyance was held to be a revocation of the will.

He

(a) See now, 1 *Vict. c. 26. s. 25.*

(c) See 2 *Ves. jun. 599.*

(b) 5 *Atk. 741.*

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He had the absolute dominion over the whole, when he made his will: he took advantage of the partition, for the purpose of acquiring an interest, not giving him more dominion over the estate, but a dominion of a different kind; and, therefore, the estate was modified in a manner different from that in which it stood at the time of making the will. He thought proper to reserve to himself the dominion over the estate, in the shape of a power of appointment. Lord *Hardwicke* observed on that case, that it was not merely to effectuate the partition, but for another purpose. That case was decided by Lord Chief Justice *Lee*, and was recognised by Lord *Hardwicke*, and has been acted upon in all the subsequent cases.

Then, although it was attempted to shew a distinction between the present case and *Rawlins v. Burgis*, yet, in fact, it was not denied that the latter case was precisely in point, except as it was contended that the words of the contract, viz. that the conveyance should be made to the testator, "his heirs, appointees, or assigns," were not to be found in that case. But that circumstance can make no difference; for the purchaser had equally in both cases the absolute dominion over the property, and might have had the conveyance made as he pleased.

Ward v. Moore (a) was a case which went still further. The conveyance there had been made to the testator and a trustee for him in fee, as joint tenants, a mode of conveyance which was adopted for the purpose of barring dower; and the Vice-Chancellor, Sir *John Leach*, said, "If the owner of an unqualified equitable fee devise it by his will, and afterwards take a conveyance of the unqualified legal fee, this is no revocation of the will,

(a) 4 *Mad.* 368.

will, because the conveyance was incident to the equitable fee, as a partition is no revocation, because incident to a joint estate. Here the subsequent conveyance was not such as was incident to the unqualified equitable fee, but made an alteration in the quality of the estate, and was therefore a revocation."

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The only case referred to, as impeaching the principle upon which the cases already mentioned were decided, was *Brain v. Brain*. (a) That was a case of a mortgage, which, of itself, operates only as a revocation to the extent of the mortgagee's interest, and upon that ground, Sir *John Leach*, who had before determined *Ward v. Moore*, decided that it did not operate as a revocation; that the whole intention was simply to create a mortgage; and there it is to be observed that no re-conveyance had actually taken place. The mortgage was made by way of trust for sale, and it was provided that, if the money were paid at the time appointed, the property should be re-conveyed unto and to the use of the testator, his heirs or assigns, or unto and to the use of such other person or persons, and for such estate and estates, and to and for such lawful trusts, intents, and purposes as the testator, his heirs or assigns, by any deed or instrument in writing should direct, limit, or appoint; and that if a sale took place under the deed, the residue of the money to arise by the sale should be paid, and such part of the property as should remain undisposed of should be conveyed, to the testator, his heirs or assigns, or otherwise as he or they should direct or appoint.

Such a re-conveyance as that deed contemplated, would have been different from an absolute reconveyance in

(a) 6 *Mad.* 221.

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in fee, and would not have restored the same estate exactly; but the re-conveyance did not take place, the testator having died before the day appointed for the payment of the mortgage money. The only question would have been on the terms in which the equity of redemption was reserved, in case the money had been paid; but that had not taken place. The mortgage certainly did not operate as a revocation. If such had not been the ground of the decision in *Brain v. Brain*, the observations of the Vice-Chancellor in that case might have formed the ground of some argument; but, in *Ward v. Moore*, the question was distinctly before the Court.

There is also the case of *Kenyon v. Sutton (a)*, to which allusion is made in the cases already referred to, and which contains the authority of another eminent Judge upon the same subject. There, a trust was created to pay debts, which is no revocation in its nature; but in the deed there was a provision, that after payment of the debts, the trustees should convey to such uses and purposes as the testator by deed or will should appoint; and for default of appointment, to himself in fee; and that provision was held to operate as a revocation. Lord *Alvanley* considered, that the charge to pay debts was no revocation, so far as related to what remained; but that if by that conveyance the testator alters the destination of the surplus, and deals with that surplus, then it is not a mere charge, but by one and the same deed he makes a charge and alters the nature of the estate.

All these authorities concur in shewing that the conveyance which was made in this case operated as a
 revocation.

(a) Cited 2 *Ves.* jun. 600.

revocation. It is unnecessary for me to go further. It is sufficient for me to say that in the present state of the law it is impossible that I can compel the purchaser to take the title.

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FLETCHER.

I am of opinion that the Master of the Rolls was right in his decision, and that the appeal is against all authority. I cannot say I see anything like a doubt upon the authorities, and therefore the appeal must be dismissed with costs.

Decree affirmed.

In the Matter of WEAVER.

Feb. 22.

THIS was a petition by the committees of a lunatic's estate. It prayed that a person of the name of *Overton*, who had been employed to appraise and make an inventory of the goods, stock in trade, and implements of husbandry, and farming utensils, live and dead stock, and crops, belonging to the lunatic, with a view to their being sold, and who had also acted as the auctioneer at the sale, might be restrained from prosecuting any action at law against the petitioners or their solicitor, for the costs and charges which he claimed in respect of his services in that behalf; and that the Master might be directed to inquire and certify what would be a proper sum to be allowed him on that account.

Order made to restrain an action brought by an auctioneer, against the solicitor in a lunacy, for the amount of his bill for appraising and selling property belonging to the lunatic, such sale having been made under the authority of the Court, and the auctioneer having acted on the instruc-

tions of the solicitor, and with the sanction of the Master, before whom he had at first carried in his claim; and a reference directed for the purpose of ascertaining what would be a proper sum to be allowed him on that account.

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In the Matter
of *WEAVER*.

It appeared, from the affidavits filed in support of the petition, that the sale had taken place under the authority of the Court; that *Overton* had been employed by the solicitor of the petitioners, with the sanction of the Master in whose office the proceedings in the lunacy were prosecuted; and that he had originally carried in his claim before the Master; but that having found the claim disputed, on the ground that many of the items charged were exorbitant and unnecessary, he subsequently commenced an action against the solicitor, for the sum of 230*l.*, being the full amount of his bill.

Mr. *Sharpe*, for the petition.

Mr. *Koe* for *Overton*, opposed the application.

The LORD CHANCELLOR said that the affidavit did not shew any special contract between *Overton* and the solicitor, the action being founded merely on a *quantum meruit*. A claim arising in the course of an employment under a lunacy, and for the purpose of carrying into effect the directions of the Court in that lunacy, unless there was some special agreement to the contrary, would be properly the subject of inquiry before the Master. He should therefore make the order as prayed by the petition, reserving the question of costs.

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MASON v. BOGG.

April 12.
May 4.

THIS was a creditor's suit, for the administration of the estate of an intestate named *Thomas Bogg*.

Discussion of the principles upon which a specialty creditor whose debt is also secured by a mortgage or lien should prove his debt under a decree in a creditor's suit. Sir J. Leach's decision in *Greenwood v. Taylor* (1 Russ. & Mylne, 185.) questioned.

The intestate, in his lifetime, purchased of one *Joseph Wilson* a freehold estate, subject to a mortgage for 900*l.*, which the intestate, by the deed of conveyance, dated the 13th of *October* 1829, covenanted to pay, but which he had not paid at the time of his decease. After his death, *William Morton* and *Jane* his wife, in right of the wife as executrix of *Joseph Wilson*, brought an action at law, upon this covenant, against the Defendant *John Bogg*, as the administrator of *Thomas Bogg*. On the 29th of *April*, 1836, a decree was made in the present suit, for an account of the intestate's debts, and the due administration of his estate; and the Defendant thereupon moved that *Morton* and wife might be restrained from proceeding in their action. Upon that motion, the Vice-Chancellor ordered that *Morton* and wife should be at liberty to proceed to judgment in their action, but that the judgment should be dealt with as the Court should direct.

The Vice-Chancellor, subsequently, on the application of *Morton* and wife, made an order, dated the 19th of *December*, 1836, by which it was directed that *William Morton* and *Jane* his wife, in right of the said *Jane* as executrix of *Joseph Wilson*, deceased, should have a lien on the hereditaments described in the indenture of the 13th of *October*, 1829, for the sum of 900*l.* being the amount of the purchase money for the hereditaments sold by *Joseph Wilson* to the intestate *Thomas Bogg*,

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Bogg, and then remaining unpaid, together with interest at 5 per cent.; and that *William Morton* and *Jane* his wife, in right of his wife as such executrix, should be considered as specialty creditors for 900*l.* and interest, and that the costs of that application should be paid by the Defendant.

The Defendant now moved to discharge the last-mentioned order.

Mr. *Koe*, in support of the motion, said that the circumstances of the present case were precisely the same as those of *Greenwood v. Taylor* (a); and, as to the costs, he said that his clients objected to pay them, because the rule of the Court was, that persons coming in to prove their debts, under the decree in a creditor's suit, should pay their own costs.

Mr. *Sidebottom*, *contra*.

The reasons upon which *Greenwood v. Taylor* was decided are not supported by principle or by authority. The Court never interferes with the rights and remedies which a creditor, either expressly or by implication, secures to himself by contract; and the only ground on which creditors are enjoined from proceeding at law after a decree is, that the decree is equal to a judgment in favour of all the creditors. A specialty creditor secures a right not only to proceed against the debtor during his life, but to obtain payment, after his death, equally with his other specialty creditors, and in priority to his simple contract creditors; and he has a right to prove a specialty debt before the Master, independently of any mortgage security

(a) 1 *Russ. & Mylne*, 185

curity which he may hold for that debt. It has never been held that the Master, or even the Court itself, is entitled to impose any terms upon a specialty creditor so coming in to prove. If, however, rights and remedies are given by the debtor, independently of contract, as, for instance, if a debtor makes his property equitable assets, a specialty creditor comes in equally with other creditors. So in bankruptcy, the creditor has not secured to himself, by contract, any specific right against the assets, and he only comes in equally; the Court acknowledging no priority at all.

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The creditor, in the present case, had a right to have proceeded to issue execution upon his judgment in the action, unless he had been restrained. He has a security on the land itself; for, independently of his having a vendor's lien, there is an express declaration in the deed that the land shall be charged. A mortgagee may prove for the full amount of his debt as a specialty creditor, and may keep the security in his pocket, until required to convey the land to a purchaser; which he can only be compelled to do upon receiving full payment.

Greenwood v. Taylor was a case in which the creditor, who was a mortgagee, sought a remedy to which he was not entitled: he had no right to sell the property without the permission of the Court, and, therefore, must have submitted to any terms which the Court might impose.

[*The* LORD CHANCELLOR.

The only equitable terms would have been the terms of his having all his rights. The mortgagee had, of course, the right of personal demand, and a right to proceed

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proceed against the assets, and a charge upon the estate. Your client has a charge on the estate, and a right by virtue of his contract. It is very difficult to distinguish between this case and *Greenwood v. Taylor*; but if the decision in that case is disputed, it is another matter.]

The distinction is, that there the party was coming forward. Suppose that in that case the creditor had gone into the Master's office to prove his specialty debt: the Master could not have refused to allow him to prove for the whole amount. Suppose then, having proved his debt for the full amount, the creditor had chosen to foreclose his mortgage, could the Court, upon foreclosure, have imposed any terms upon him? It must have been upon the ground of the mortgagee's coming forward, that his rights were interfered with; and upon that supposition only can the decision in that case be supported.

In all the cases in bankruptcy, in which applications of the like nature have been granted, the reason for granting them has been declared to be the peculiar jurisdiction in bankruptcy, and not any general principle of courts of equity, except the principle that equality is equity. In *Cooke's Bankrupt Law*, the rule in bankruptcy is attributed to legislative enactment, and is thus stated: "The aim of the legislature, in all the statutes concerning bankrupts, being, that the creditors should have an equal proportion of the bankrupt's effects, creditors of every degree must come in equally." (a)

If there were such a rule of equity as that which Sir *John Leach* propounds, in *Greenwood v. Taylor*, it would

(a) Vol. i. p. 119, 4th ed.

would be to be found in some text book or decided case: but it cannot be found in either. There is no rule, that a party, who reserves to himself a priority with respect to one fund, and an equality with respect to another, must subject himself to the loss of that priority by proving his debt under a decree.

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The ground on which Sir *John Leach* put his decision in *Greenwood v. Taylor* is wholly inapplicable. He intended to apply to the case the principle of marshalling assets: but that principle has never been applied to affect the interest of the creditor, or to diminish his rights; it is to be applied only as against the owners of the property charged. That the principle which the decision in *Greenwood v. Taylor* professes to follow, cannot be the principle of a court of equity, is further proved by the circumstance that in bankruptcy a particular mode is prescribed. A creditor may there prove; but then he must give up his security; or he may obtain an order that his security should be sold, and that he should prove for the difference. In equity, however, a party may come in and prove without giving up or affecting his securities, except so far as the amount of his debt may be diminished by what he may receive. The machinery, provided in bankruptcy, is entirely wanting in equity; for how is a creditor to be compelled to elect? How is he to have his proof cut down by the circumstance that he has other securities?

It is to be observed, that no case was cited in *Greenwood v. Taylor*, and the decision has not been acted on in the Masters' offices.

Mr. *Koe*, in reply.

I am informed that *Greenwood v. Taylor* has been acted upon ever since it was decided.

[The

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[The LORD CHANCELLOR.]

I cannot distinguish this case from *Greenwood v. Taylor*; but, with respect to the principle of that case, it is to be observed, that a mortgagee has a double security: he has a right to proceed against both, and to make the best he can of both. Why he should be deprived of this right because the debtor dies, and dies insolvent, it is not very easy to see. The question can only arise when there is a deficient security and an insolvent estate. So that the worse the creditor's case, the harder the course of the Court against him. What you contend is that the creditor shall not proceed to enforce his legal rights unless he gives up his security.]

The decree of this Court is in the nature of a judgment for all creditors.

[The LORD CHANCELLOR.]

Not for the purpose of altering the securities of the creditors. It is a judgment according to their legal rights.]

According to the principle advocated in the argument on the other side, the creditor should have been left to go in before the Master, and was not entitled to a declaration by the Court that he had a lien upon the estate.

[The LORD CHANCELLOR.]

He had a right to make his election. You cannot say a creditor shall not go in and prove, although the consequences of his taking that course may be that he will have made his election.]

It

It was quite unnecessary for the Vice-Chancellor to have made any declaration as to the amount of the lien.

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[The LORD CHANCELLOR.

I do not see, according to your view of the case, how the order injures you. The order declares the fact of the lien. You cannot dispute the creditor's right to prove as a specialty creditor. It will be for you hereafter to contend, that having taken the dividend under the proof, he is deprived of the benefit of his lien. He is not bound to say anything about his lien. In the administration of assets, the Court does not interfere with the legal right. The effect of what you contend for is, that if the debtor dies, the nature of the creditor's rights is altered.]

I am contending for what is expressly decided by *Greenwood v. Taylor*.

[The LORD CHANCELLOR.

I take it for granted you can find no other case. It is an extremely important case, and should not be disposed of hastily. I am desirous of having it thoroughly investigated before I act upon it.]

The counsel, on both sides, admitted, that they had been unable to find any other case: but they differed upon the question whether the rule laid down in *Greenwood v. Taylor* had been acted upon; and the motion stood over in order that the counsel might make further searches, and that the Registrar might search for precedents upon the subject, which he was directed by the Lord Chancellor to do. (a)

Mr.

(a) See *Davis v. Battine*, 2 *Russ. & Myle*, 76.

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May 4.

Mr. Koe, on a subsequent day, renewed his application for the discharge of the Vice-Chancellor's order, and mentioned the case of *Perry v. Barker*. (a) Mr. *Sidebottom* opposed the application; but neither of them produced any authority upon the point decided in *Greenwood v. Taylor*.

The LORD CHANCELLOR said it appeared to him that the Vice-Chancellor's order asserted that about which there could be no doubt, namely, that *Joseph Wilson*, the deceased vendor, had a lien, and that he was a specialty creditor, and that it left the question quite open as to how his rights were to be dealt with. The effect of discharging the order would be to leave the injunction which had been granted in force, and to deprive the creditor of the means of enforcing his rights. His Lordship thought that the matter was not in such a state as to call for an opinion upon the question which arose in *Greenwood v. Taylor*, and which had been before discussed; and he refused the motion with costs.

It appeared by the affidavit of a clerk of the agents for *Morton* and wife, sworn on the 26th of *April*, that subsequently to the argument on the 12th of *April*, the Deponent applied at the offices of the different Masters of the Court, for the purpose of ascertaining the manner in which mortgagees are permitted to prove under a decree in a creditor's suit, on their bond or covenant in the mortgage deed; and that one of the Masters, personally, and the chief clerks of seven of the other Masters had informed the deponent, that the practice in their respective offices is for the Master to allow mortgagees,

(a) 8 Ves. 527. and 15 Ves. 198.

gagees, who come in as creditors, to prove on their mortgage bond, or on the covenant in their mortgage deed, as specialty creditors, for the whole amount of principal and interest due to them, and that those Masters do not compel mortgagees, applying to prove their debts, to sell the property included in their mortgages, and prove for the difference, or to have the same valued, and then prove for the difference.

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It also appeared, by the same affidavit, that the chief clerk to another Master, and who had also been clerk to that Master's predecessor, and had been a chief clerk longer than any other Master's clerk, stated, in writing, that when a mortgagee proves before the Master on his bond or covenant, he does so to the full extent of the principal and interest which he swears to be then due to him; but the Master states in his report, that the creditor so proving also holds a mortgage for the same debt, which leaves the Court to give such directions, with respect to the mortgage, as may be requisite. The chief clerk of another Master did not remember that such a case had occurred. The deponent also stated that he had shewn the report of the case of *Greenwood v. Taylor* to the Master and the nine chief clerks before-mentioned, and that they all informed the deponent that they had not been previously aware that the case had been decided.

After the affidavit above stated had been sworn, the same Master, who is mentioned in it, furnished the agents of *Morton* and wife with the following written opinion:—“ I am of opinion that it is not the practice in the Masters' offices to put mortgagees who prove their debts in a suit for the administration of assets under any terms; and that therefore the practice in the

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Masters' offices, and that in bankruptcy, varies. The Master is directed to take an account of debts in ordinary cases, without any special directions. On his report coming on for further directions, an order may be made for marshalling the assets, or particular directions given to meet the justice of the case; but the Master has no power to order the securities to be given up on proof of the debt, or to direct a sale of the mortgaged estate."

July 10.

HUTCHINSON v. STEPHENS.

The Court has a right to advance, at its discretion, any cause which is ripe for hearing. *Seemle*, the Lord Chancellor has no jurisdiction to discharge or vary an order made for that purpose by the Master of the Rolls.

THE Plaintiff having set down this cause for further directions at the Rolls, the Defendant applied, upon notice, to the Master of the Rolls, for an order that the cause might be advanced to be heard, upon further directions, as a short cause. The Defendant also furnished the Plaintiff with minutes of the order proposed to be made on further directions.

When the application was made in the Rolls' Court, the Plaintiff's counsel opposed it: but being asked by the Master of the Rolls whether he could state that the cause was not proper to be heard as a short cause, he admitted that he was not prepared to say so. No facts were stated, upon affidavit, to shew that it would be improper that the cause should be heard as a short cause, nor was any objection stated at the bar to the minutes proposed by the Defendant. Under these circumstances, the Master of the Rolls made an order directing that the cause should be advanced to be heard, upon further directions, as a short cause. (a)

Mr.

Mr. *Wright* now moved that the Master of the Rolls' order might be discharged, and he urged that it was unprecedented. (a)

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The LORD CHANCELLOR (without calling upon Mr. *Rogers*, who appeared to oppose the motion).

I doubt very much whether I ought in any case to interfere with the order in which a judge of another branch of the Court thinks fit to take the causes in his paper. The Master of the Rolls has an original jurisdiction, and has a paper of his own. The present case is one in which it was represented by the Defendant to the Master of the Rolls, that there was nothing to be done, and that the decree, on further directions, would be quite of course; and the Plaintiff being called upon by a notice of motion to object to the cause being advanced, no reason was stated on affidavit why it should not be so advanced, and no objection was stated at the bar to the minutes proposed by the Defendant. Under these circumstances, it would be very strange to say that the Plaintiff has such a vested interest in the unavoidable delays of the Court, that he is entitled to prevent the cause coming on, till all the causes which have been set down before it (and which may be long litigated cases) shall have been disposed of. The only real question would be, whether it was fair to the other suitors of the Court to take this cause out of its turn. The Plaintiffs are bound to be ready when the cause is in a proper state to be heard, and it is only an accident, arising from the state of other causes, that it does not come on immediately. I have never heard it doubted that the Court will exercise its jurisdiction as to the time when it will hear a cause which is in a state

(a) See *Mountford v. Cooper*, 1 *Keen*, 464., and *Ker v. Cusac*, 7 *Sim.* 520.

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state to be heard, the *subpoenas* to hear judgment being returnable.

I see no ground for my interference in this case, and I very much doubt, whether I could interfere, even if I thought that the Master of the Rolls had not exercised a sound discretion in the present instance. Such an interference would be very inconvenient, and I think it extremely doubtful whether it would not be inconsistent with the act of parliament, which gives the Master of the Rolls jurisdiction. (a)

(a) See 3 G. 2. c. 30.

April 4.

✓ MARR v. LITTLEWOOD.

Receiver granted, at the instance of an executor, pending a suit in the ecclesiastical court, to have the probate annulled; the Defendant, who was the party impeaching the will and setting up an intestacy, having by her own acts prevented the executor from getting in the assets.

THE bill, in substance, stated that *John Littlewood* died in the month of *June* 1836, leaving a will which bore date the 25th of *January* 1819, and which the Plaintiff, as the surviving executor, duly proved: that at the time of his death, the testator was, and his estate now is, indebted to the Plaintiff in the sum of 500*l.*: that the principal or only personal estate of which he died possessed was a sum of 599*l.*, lying in the hands of his bankers at *Doncaster*, a bond for 75*l.*, and two bills of exchange: that the Plaintiff, after obtaining probate, applied to the bankers to pay over the sum in their hands to him as executor; and that they would have complied with his request but for the interference of the Defendant *Ann Littlewood*, the testator's widow, who gave the bankers notice not to do so, alleging, as was the fact, that she disputed the validity of the will, and had taken proceedings for the purpose of recalling the

the probate: that the ground of those proceedings was that *John Littlewood*, as the Defendant alleged, was to be considered as having died intestate, inasmuch as the will, proved by the Plaintiff, was made while the testator was a bachelor; and that by afterwards marrying the Defendant, and having children by her, he had in effect revoked the will: that the Defendant had served the Plaintiff with a citation to bring in the probate in order that it might be annulled, and that administration of the estate and effects of *John Littlewood* might be granted to her; and that the suit was now depending in the Ecclesiastical Court, and involved a question of doubt and difficulty, which might not be determined for some time; and that in the meanwhile, the Defendant had given notice to the bankers, and to the other debtors of *Littlewood* not to pay their debts to the Plaintiff; and that the estate of *Littlewood* was insolvent, and the property or part of it was in danger of being lost.

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The bill prayed the appointment of a receiver to get in the outstanding personal estate pending the proceedings in the Ecclesiastical Court.

The Plaintiff moved before the Vice-Chancellor for a receiver. The motion was supported by the Plaintiff's affidavit, verifying the statements in the bill. In opposition to it, several affidavits were made by the Defendant and other persons, tending to throw discredit on the motives and conduct of the Plaintiff, in reference to his interference with the affairs of *John Littlewood*, and to impeach the validity of the will.

The Vice-Chancellor having refused the motion, the application was now renewed, by way of appeal.

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Sir *W. Horne* and Mr. *Koe*, in support of the motion.

The motion, which is quite of course, is founded on the fact that the Defendant, by the proceedings she has taken, has deprived the Plaintiff of the power of any longer acting upon the probate which he had obtained, so as to secure the property for the benefit of the parties interested. The Plaintiff is not himself attempting to act, or seeking to put the assets in jeopardy: he merely asks, as a principal creditor, to have the assets placed in security, until the proper court has determined who is the legal hand to receive and distribute them.

Mr. *Jacob* and Mr. *Bethell*, *contra*.

The question is, whether the mere institution of a suit in the Ecclesiastical Court, disputing the validity of the will, and seeking to have the probate annulled, furnishes a sufficient ground for the interference of the Court, without some special circumstances being shewn in the nature or state of the property, which would render such a step expedient and beneficial. Here the estate is extremely small; it does not appear to be in any danger; and the additional security to be derived from the appointment of a receiver, and the payment of the money into court, is certainly not worth the cost. *Littlewood* is stated to have died insolvent. The utmost benefit to be obtained from this suit is only the difference between the solvency of the Accountant-General, and that of the testator's bankers, during the short interval that must elapse between the time of the present motion, and the judgment of the Ecclesiastical Court. The question before that Court, as it is stated in the Plaintiff's bill is too clear for argument, and must be decided against him in the course of a few weeks. The judgment of Sir *John Leach*, in *Jones v. Frost* (a), shews

(a) 5 *Mad.* 1.

shews that a Court of Equity will not interfere by the appointment of a receiver, where a suit respecting the validity of a will is depending in the Ecclesiastical Court, unless a special case is made; and the same principle was laid down by your Lordship in *Watkins v. Brent*. (a) If it should turn out eventually that the Plaintiff is not entitled to probate, nothing further can be done upon this bill; and the money, should it be brought into court upon the present motion, must remain impounded, and will only be got out by the institution of a new suit.

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The LORD CHANCELLOR.

The case stated on behalf of the widow, alleges that probate ought not to have been granted to the Plaintiff; and now, it is a matter not ascertained, whether the proceedings in the Ecclesiastical Court have, or have not suspended the operation of that probate. Thus much, however, is clear, that the widow who resists the appointment of the receiver, has herself destroyed the effect of the probate; for she has given notice to the bankers and to the other debtors of the testator's estate, who are stated to have been perfectly willing to pay their debts, not to pay them to the Plaintiff. There is, therefore, through the act of the party opposing the application, an incapacity on the part of the executor to proceed under the probate (assuming that there is a legal probate), even for the collection and preservation of the assets.

The doctrine laid down by Sir John Leach in *Jones v. Frost* (b) does not in the least interfere with the ground upon which I proceed here. In that case it did not sufficiently appear that there was a litigation pending in the

(a) 1 *Mylne & Craig*, 97.

(b) 3 *Mad.* 1.

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the Ecclesiastical Court; whereas, here, unquestionably such a litigation is now depending between these parties; and it is solely by the act of the party prosecuting that litigation, that the legal power of the Plaintiff has been rendered unavailing. In *Watkins v. Brent* (a) I expressed an opinion, that a Plaintiff who had instituted proceedings in the Ecclesiastical Court for the purpose of challenging a will, and who sought to deprive his adversary of the title to administer the assets, could not put forward that circumstance, as of itself furnishing a ground for the interference of the Court: but here the party, who disputes the title of the Plaintiff, has herself deprived him of the power of securing the fund.

Upon these grounds, I cannot, if it is pressed, refuse to appoint a receiver; but the fund is so small that I am not disposed to give him a per-centage.

(a) 1 *Myne & Craig*, 97.

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FLOWER v. MARTEN.

April 6. 8.

THE Plaintiff was the only son and heir at law of the late Sir *Charles Flower*, Bart. Some time prior to the year 1822, his expensive habits and mode of life had occasioned much dissatisfaction to his father, and had led to differences, which terminated in a total estrangement and suspension of intercourse between them. In the course of that year, however, the Plaintiff, who was then married, having got into further pecuniary difficulties, was induced to apply to his father, and to request him to advance a sum of money to relieve his immediate necessities. The application was referred by Sir *Charles Flower* to the Defendants *Robert Humphrey Marten* and *John Petty Muspratt*, two of Sir *Charles's* old and confidential friends, with a request that they would take into consideration all matters in difference between the Plaintiff and himself, more especially as regarded the Plaintiff's debts and the expenses of his mode of living, and that they would give him their impartial advice as to the course he ought to adopt towards his son, by which advice he professed himself willing to be governed. Those gentlemen undertook the reference, and entered into communication with the Plaintiff, who likewise consented to abide by the determination to which they should come with respect to his future course: and, after having fully investigated and considered the state of the Plaintiff's affairs, they communicated the result of their deliberations in the form of a letter, addressed to Sir *Charles Flower*, and containing a number of distinct propositions, which were intended and understood by all parties as the basis of the proposed arrangement between the father and the son.

Bond for a sum of money ordered to be delivered up to be cancelled; the Lord Chancellor being of opinion, upon the evidence, first, that the bond was not intended to operate as a security for money at all events, but was given for a collateral purpose, which had been fully satisfied; and, secondly, if that were doubtful, that the obligee's subsequent conduct and mode of dealing with the bond during the whole of his life amounted, in equity, to a release of the debt.

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This letter, after stating that the amount of the Plaintiff's debts and liabilities, as ascertained by a written statement made out and signed by the Plaintiff, did not exceed 4000*l.*, exclusive of some tradesmen's bills and other demands not then liquidated, proceeded as follows:— "Having now for several weeks given our anxious attention to this interesting subject, and trusting that our decision will lead to a sincere and lasting reunion between you and your son, we recommend and determine, —

1st. That over and above the large sums already paid and advanced for your son, you relieve him from all the debts and liabilities referred to in the statement so signed by him; it being understood that you are, against the payments made and to be made for him, to retain the balance received, or to be received for him from the Brewery, and the produce of the *Indian Stock* lately sold, and of the lease and furniture in *Bedford Square*, and to have such security from Mr. *L.* as you may be enabled to obtain, for 1100*l.*, or whatever sum may appear to be due from him in any way to your son; and for obtaining which, you are to have all requisite legal authority from your son. You are likewise to have the advantage of any securities, bonds, judgments, agreements, abatements, compromises, &c., from any parties, whereby the nominal amount of your son's debts may be diminished.

2dly. That your son shall give you his bond, bearing date from the last payment of any sum in the aforesaid statement, for 4500*l.*, in satisfaction of all pecuniary claims upon him, including the payments in the said statement to be yet made, such bond to be payable on demand, with interest at 4 per cent. per annum. But the bond is to remain in our hands, and not to be acted upon

upon for the recovery of principal or interest within six years from the date of the bond, without the consent in writing of us, or of the survivor of us; and moreover, that in case we or the survivor of us shall, at any time within six years, by a memorandum in writing direct the bond to be delivered up and cancelled, such cancellation, or an order from us or the survivor of us for that purpose, shall operate as a total extinguishment of the debt, both as to principal and interest."

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The 3d and 4th propositions were, for the present purpose, immaterial. The 5th and 6th were as follows:—

5thly. As your son must again have a house to reside in, and as he is content to have one suited to his income, we further recommend and determine that you present your daughter-in-law with 500*l.*, to be laid out in furnishing the house in which they may intend to reside, on their having fixed upon such house and declaring their want of furniture for it. Their linen, plate, &c., now in their possession, to remain their own.

6thly. Should any misunderstanding arise on this our determination, we reserve to ourselves, in order to fulfil our undertaking for both parties, the power to decide on such matters as may be the subject of doubt."

The letter then informed Sir *Charles*, that his son, so far as he was concerned, was perfectly ready to accede to these propositions, and that he was anxious to be allowed to renew his intercourse with his father, and to testify his deep sense of the obligations which he owed to him. It concluded by expressing the anxious hope of the writers, that the arrangements which they had proposed might be carried into effect, and might lead to a cordial and lasting reconciliation between the parties.

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The terms recommended in the foregoing letter were accepted and acted upon by both parties; and the Plaintiff, in compliance with the second proposition stated in the letter, executed and delivered to the referees, Messrs. *Marten and Muspratt*, his bond to Sir *Charles Flower*, dated the 2d of October 1822, in the penal sum of 9,000*l*.

The condition annexed to the bond was as follows;
 “Whereas the said Sir *Charles Flower* has agreed to accept from the said *James Flower* his son, the above written bond or obligation, with a condition for payment of 4500*l*. and interest, as hereinafter mentioned, in full satisfaction of all claims and demands upon him; and the said *James Flower* has agreed to enter into and execute such bond accordingly; but under the special understanding and agreement of both parties, and particularly of the said Sir *Charles Flower*, that the said bond shall remain in the hands of *Robert Humphrey Marten* and *John Petty Muspratt* of the city of *London*, merchants, and shall not be acted upon for the recovery of principal or interest, within six years from the date thereof, without the consent in writing of them, or of the survivor of them: and, moreover, that in case they or the survivor of them shall, at any time within six years, by a memorandum in writing, direct the said bond to be delivered up and cancelled, such memorandum or cancellation shall operate as a total extinguishment of the debt both as to principal and interest: now the condition of the above written obligation is, that if the said *James Flower*, his heirs, executors, or administrators, do and shall well and truly pay or cause to be paid to the above named Sir *Charles Flower*, his executors, administrators, or assigns, the full sum of 4500*l*. on the 2d day of *October* 1823, with interest for the same in the mean time, by half yearly payments, at the rate of 4*l*. per cent.
 per

per annum, or if the said *Robert H. Marten* and *John P. Muspratt* or the survivor shall, in manner aforesaid, direct the above written bond or obligation to be cancelled, then the same is to be void; or else to remain in full force and virtue."

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Sir Charles Flower advanced the money that was necessary to discharge the amount of the Plaintiff's debts; the other parts of the arrangement were at the same time carried into effect, and the Plaintiff renewed his intercourse with his father. No further misunderstanding or disagreement arose between them. The subsequent conduct of the Plaintiff was in the highest degree satisfactory to his father, and from the time of their reconciliation to the period of his father's death, they continued to live upon terms of intimacy and affection. No demand was made against the Plaintiff, during the life time of *Sir Charles Flower*, in respect of any part of the principal or interest secured by the bond. The bond itself was suffered to remain in the custody of Messrs. *Marten* and *Muspratt*; but no memorandum in writing, directing it to be delivered up and cancelled was ever made by those gentlemen or either of them; and at the time of *Sir Charles Flower's* death, it was lying in their hands uncanceled.

Sir Charles Flower died in the month of *September* 1834, leaving a will, by which he bequeathed his residuary personal estate to trustees, upon trust for the Plaintiff for life, with remainder to his children, and in default of such issue, upon certain trusts for the benefit of his (the testator's) five daughters and their respective issue.

When the executors of *Sir Charles Flower* were informed of the existence of the bond, a question arose whether,

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whether, under the circumstances stated, it ought to be considered as a subsisting instrument and be put in force against the obligor; and the present suit was instituted in order to have that question determined.

The bill, which was filed against Messrs. *Marten* and *Muspratt*, and against the executors of Sir *Charles Flower's* will, charged, among other things, that the bond was never intended as a security for the repayment of the sum of 4500*l.*; but was executed under the circumstances, and for the considerations stated in the letter; and that the purposes for which it was given having been fully satisfied, it ought now to be delivered up to be cancelled.

The Plaintiff had no issue living. The daughters of Sir *Charles Flower* and their respective children, who had an interest in the residuary estate, expectant on the Plaintiff's death without children, were not made parties to the suit.

The Defendants, Messrs. *Marten* and *Muspratt*, by their answer stated, that their intention in procuring the Plaintiff to execute the bond, was to enable Sir *Charles Flower* to hold the same as a security for the prudent conduct of the Plaintiff for the future; and that they on that account reserved to themselves the right of cancelling the bond, in case the Plaintiff's conduct should be satisfactory to his father; and that they further intended that the monies advanced by Sir *Charles Flower* to the Plaintiff might be treated, either as a gift to, or as a debt due from, the Plaintiff, according as his future conduct should be prudent and satisfactory to his father, or otherwise; and they stated their belief that Sir *Charles Flower* fully understood such to be their intention, and acquiesced in the propriety thereof.

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The depositions of the same Defendants (who were examined as witnesses in the cause) among other things stated, that they distinctly understood, at the time when the bond was executed, that it was taken by Sir *Charles Flower* as a sort of security for the future good conduct and economy of his son, and that it was not to be acted upon or enforced, if the Plaintiff's mode of living and behaviour were satisfactory to his father. These were the views with which they recommended the bond to be taken and deposited with them; and they were convinced, that it was the intention of Sir *Charles Flower*, when he took the bond, not to interfere, or to require payment of any part of the sum secured by it, if the Plaintiff conducted himself to his satisfaction. The deponents further stated, that they considered themselves to hold the bond upon trust to act respecting it, according to the intention and meaning of their letter, and to be perfectly at liberty to cancel it, if they saw fit, within six years from its date, without any reference to Sir *Charles Flower*.

The Defendants, the executors, by their answer stated, that, although Sir *Charles Flower* was remarkably accurate in keeping the accounts of his pecuniary transactions, and was in the habit of regularly making out a yearly statement or balance sheet in which he entered every item of the assets and securities of which his property consisted, no entry relative to the bond in question, or to the principal or interest which it purported to secure, was to be found in any of the papers or account books which had come into their possession as his executors.

It was also deposed by a person who had lived for many years with Sir *Charles Flower* in the capacity of a confidential clerk, that no part of the principal or interest due upon the bond was ever demanded of the
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Plaintiff by his father, although if any such demand had been made, the deponent must have been acquainted with the fact, as all Sir *Charles's* pecuniary transactions passed through his hands. The witness further deposed, that he knew from communications with Sir *Charles Flower* at the time when the bond was given, that it was not Sir *Charles's* intention to enforce it, or to require the payment of any part of the sum secured by it, if the Plaintiff's conduct was satisfactory to him.

That the reconciliation between the parties had been complete and permanent, and that the subsequent conduct of the Plaintiff had been entirely satisfactory to his father, was proved by the evidence of all the witnesses.

Mr. *Wigram* and Mr. *Fisher*, for the Plaintiff.

The only difficulty in the case arises from the fact that in consequence of the inadvertency of the referees, with whom, as trustees, the bond in question was deposited, the terms of the condition have not been literally complied with, the bond still remaining in their hands uncanceled, and no memorandum directing its cancellation having been executed by them within the period prescribed by the condition. That, however, constitutes no objection in a Court of Equity, which will look to the substance and intent, rather than the form of the transaction. Now, upon the evidence, there can be no doubt that the sole purpose for which the bond was originally given, has been fully answered; and it would be contrary to every principle of equity, to permit an instrument given for one purpose, to be used for a totally different purpose against the party who gave it. The circumstances of the transaction, the relative situation of the parties, the language of the letter, and the peculiar terms of the condition, all sufficiently shew, what the

the depositions also have established, that the bond was never considered as a mere security for money; that it was meant to operate as a check upon the proceedings of the Plaintiff, and be used as the means of controlling his future expenditure for the term therein specified; that the intention and understanding of all parties were, that if the Plaintiff's conduct during the whole period proved satisfactory, the instrument should be no longer a valid and subsisting obligation. The right of keeping alive or destroying the bond was to remain with the referees, and be exercised by them at any time within the prescribed period. At the end of that period their discretion ceased; and upon the fair construction of the condition, explained as that condition is by the second proposition in the letter, and by the testimony of the referees themselves, it then became their imperative duty immediately to destroy the instrument. The power vested in them was a power coupled with a trust, which they were at liberty to execute at any time within the six years, in a certain event, for the benefit of the obligor; and as the event was fully realised by the subsequent good conduct of the Plaintiff, the same benefit must by implication be considered to be reserved to him, as if the trustees had actually exercised their power; and the trustees having omitted, through carelessness, to perform the trust, the Court ought now to supply the omission; *Harding v. Glyn* (a), *Brown v. Higgs* (b), *Bax v. Whitbread*. (c) It was not discretionary in the trustees to abstain from cancelling the bond, provided the Plaintiff conducted himself in a satisfactory and becoming manner; still less did such a discretion continue after the six years had expired, to which

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(a) 1 *Atkins*, 469.

(c) 6 *Ves.* 26.

(b) 4 *Ves.* 708. 5 *Ves.* 495.

8 *Ves.* 561.

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which in terms their power was restricted, and after every thing had been gained which it was the object of the bond to accomplish. The Plaintiff, therefore, might have filed a bill immediately after the expiration of the six years, praying that the instrument might be delivered up to be cancelled; and the Court, upon the same evidence which is now before it, would have made a decree accordingly.

That Sir *Charles Flower* viewed the transaction precisely in the same light as the Plaintiff and the referees, is plain from the whole tenor of his subsequent proceedings. He allowed the bond to remain in the hands of the referees, from the expiration of the six years, down to the time of his death; he never made any inquiries respecting it, or sought to deal with it as part of his property, or set up any claim in respect of it; in short, he considered it, as all the parties obviously considered it, merely as a piece of waste paper. These circumstances shew, if any doubt could exist with respect to the object with which the bond was originally taken, or the period for which it was to operate, that now, at all events, the obligation must be considered as discharged. Very slight circumstances will be sufficient to raise such a presumption, especially in a case like the present, where upon the intent of the parties, the existence of the debt constituted by the bond, was, after the lapse of the six years, more than doubtful. In *Aston v. Pye* (a) an entry in a testator's books in these words, "*Pye* pays no interest, nor shall I ever take the principal unless greatly distressed," was held to amount to a release of the debt. In *Eden v. Smyth* (b) where the testator's son-in-law,

(a) stated in *Eden v. Smyth*, (b) 5 *Ves.* 341.
 5 *Ves.* 350. n.

law, Sir *F. Eden*, owed him three bond-debts, the Court, upon evidence derived from the testator's accounts, and from letters and memoranda in his handwriting, presumed that the bond-debts had been satisfied. In *Byrn v. Godfrey (a)*, a somewhat similar case, where the Court came to a contrary conclusion, the charges in the bill with respect to the intention of the testator were not supported by the evidence. In *Wekett v. Raby (b)* the House of Lords affirmed Lord *Macclesfield's* decree, deciding upon the evidence of parol declarations made by the obligee on his death-bed, that a bond, which his executors had put in suit against the obligor, should be delivered up to be cancelled. The same principle has more recently been applied in *Gilbert v. Wetherell (c)*, where Sir *J. Leach* laid it down distinctly that the Court would not permit an executor to set up or revive a claim which it was clear upon the evidence the testator had himself abandoned; *Leche v. Lord Kilmorey. (d)*

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Sir *W. Horne* and Mr. *James*, for the executors of Sir *Charles Flower's* will.

The explanation which the Plaintiff gives of the transaction is extremely natural and probable; and the executors have no wish to set up what may seem an ungracious opposition to the object of his suit. Nevertheless, in justice to themselves, and still more to the residuary legatees over, who are not here to protect their own interests, they feel bound to submit to the Court the difficulties with which the case is embarrassed. Indeed, it is a matter of extreme doubt how far it would be competent for the Court to make any decree, in the absence of parties who are so materially interested

(a) 4 *Ves.* 6.

(c) 2 *Sim. & Stu.* 254.

(b) 2 *Bro. P. C.* 386. *Toml.* ed.

(d) *Turn. & Russ.* 207.

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interested in the question as the sisters of the Plaintiff and their respective families.

With respect to the import and effect of the bond, the Court has no right to look at parol evidence, to aid the construction of a deed. Here the instrument must speak for itself, and there is nothing in its frame or language, which, if fairly construed, favours the supposition that its operation was to cease at the end of the six years. All that is expressed, and all that was meant by the condition is, that a discretionary power of cancellation should remain during six years vested in the referees. There is no foundation for the argument, that because the Plaintiff conducted himself well throughout the whole of the six years, the depositaries were therefore bound, at all events, to direct the instrument to be cancelled. If that were so, the duty of cancellation obviously would not arise, until after their power had determined by the expiration of the period during which, according to the terms of the condition, the discretion was to continue. The right of cancellation was not a power coupled with a trust, which in the circumstances it was imperative on them to execute, or which, upon their default, the Court ought now to execute for them. It was simply a power, which vested in them a discretion resting solely in their own breasts; and they having declined to exercise it within the prescribed period, (doubtless for reasons which seemed sufficient at the time, although they have since been forgotten), the power is altogether gone, and the defect cannot now be supplied. *Brown v. Higgs* and cases of that description have no application. It is not pretended that the referees were prevented from availing themselves of their power, in consequence of any accident or fraud.

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The evidence of contemporaneous intention furnished by the testimony of the referees, and the contents of their letter, supposing for a moment that such evidence is admissible, does not carry the case further than the bond itself; for it only shews the understanding and intention of all the parties to the arrangement, that a control over the conduct of the son should be retained by the referees, by means of their discretionary power, during the six years, not that at the end of that period the bond should at all events be cancelled, or the liability upon it be determined. The instant their discretion ceased, the property in the bond absolutely vested in the obligor, and its subsequent existence and validity became dependent upon his pleasure. The obligor, however, has not seen fit to exercise or declare any pleasure on the subject, and it would be most dangerous in the absence of any declared intention on his part, to presume what he would have done had the circumstances been called to his mind, and to take that presumption as the foundation for a decree.

The evidence of subsequent intention amounts to no more than this, that Sir *Charles Flower*, after the expiration of the six years, never expressed any inclination either way. How, indeed, should he, if, as the history of the case shews, the very existence of the bond, was forgotten by all parties? It is probable, no doubt, that if the fact had been brought to his attention, he would have done what the bill seeks to have done, and would have given directions that the instrument should be destroyed; but as he has not done so, or even entertained the intention of doing so, it must remain in equity, as it is at law, a subsisting and valid instrument. In *Eden v. Smyth*, the case which comes the nearest to this case, the testator dealt with the bond debts as if they were actually gifts forming part of the fortune bestowed upon

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his daughter; and Lord *Rosslyn* decided the case upon the admission of written evidence that such was the testator's intention. In *Aston v. Pye* and all the other cases that have been cited, the Court has inferred an intention, on the part of the obligee, to release or cancel the debt, from some positive act done or express declaration made: here there is an entire absence of acts and declarations; and the Court is called upon, first to imply from that absence, the existence of a purpose, and then to give effect to the purpose so implied.

Mr. Geldart, for Messrs. *Marten* and *Muspratt*.

Mr. Wigram, in reply, said that the residuary legatees over had not been made parties to the suit, because they were extremely numerous, and their interest was uncertain and remote. Besides, they were sufficiently represented by the executors. The facts of the case were fully before the Court upon the cause as it stood, and no additional light was to be hoped for from further inquiry before the Master.

The LORD CHANCELLOR said he entertained no doubt as to the jurisdiction: the only difficulty he felt arose from the absence of the other residuary legatees.

April 8.

The LORD CHANCELLOR.

It was not from any difficulty which I felt as to the law of the case, that I took time to consider my judgment; but because I was called upon to deal with a large sum of money, in the absence of persons who had an interest in the fund, and when, in strictness, there were no parties before the Court to litigate the question adversely. For that reason it occurred to me, that the
safest

safest course might be to direct a preliminary inquiry into the facts. On looking into the papers, however, I think it is clear that the question must depend solely upon the evidence of these two gentlemen, Messrs. *Marten* and *Muspratt*, from whose testimony the intention of the father is necessarily to be collected, and that nothing would be gained by sending the cause into the Master's office.

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Of the jurisdiction of the Court I entertain no doubt whatever.

In this case a large sum of money was advanced by the Plaintiff's father, for the purpose of paying off the debts of his son. That advance may either have been made by way of gift, or as a loan to the son. The taking a security for the amount is, *primâ facie*, evidence that the father meant originally to treat the sum as a debt: but that presumption is capable of being explained away and rebutted; and even if the sum constituted a debt in the first instance, the debtor, according to the authorities, is at liberty to shew that the creditor subsequently altered his intention and treated it as a gift.

In the present case, both circumstances concur. Upon the evidence of the gentlemen with whom the bond was deposited, I cannot suppose that the father intended to treat the money, which he advanced on his son's behalf, as being, at all events, a debt. He plainly meant to keep alive the security for a time, as a means of controlling and influencing the conduct of his son; and that was the main object of the instrument, to which the securing of the sum advanced was only collateral and subsidiary; but it does not appear from the testimony of the referees, that the father ever actually dealt with

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v.
MARTEN.

the bond as creating a debt, or as forming a part of his assets.

With respect to the six years during which the referees had the power of entirely discharging the obligation by executing a memorandum to that effect, the father had delegated that discretion to them as two of his confidential friends; and the discretion was wholly inconsistent with the notion that the bond was given merely, or principally, to secure the repayment of a sum of money. Within that period, events had taken place, which, as the referees themselves state, induced them to think that the claim was no longer available: the father and son were completely reconciled and united; and the conduct of the son throughout had been highly satisfactory to the father. Now, if the events took place which would render it the duty of the referees to exercise the trust reposed in them by indorsing upon the bond the proposed memorandum, of which the effect would be to avoid the security and discharge the debt at law, the situation of the Plaintiff cannot, in a court of equity, be affected by their omission to do that which they ought, under the circumstances, to have done.

That of itself would be a sufficient ground on which to rest the Plaintiff's title to relief. But there is also another ground, to be deduced from the principles which were distinctly laid down in the cases of *Wekett v. Raby* (a) and *Eden v. Smyth* (b), namely, that whether this obligation constituted a debt or not, either originally or during the continuance of the prescribed period, the father subsequently did not intend that it should be treated as a debt due from his son to his own estate,

(a) 2 Bro. P. C. 386. Toml. ed.

(b) 5 Ves. 341.

estate, and be put in force accordingly. Nearly six years elapsed after these two gentlemen ceased, according to the letter of the condition, to have any authority or control; nevertheless, throughout the whole of that period, the father left the bond in their hands, and treated his son in a manner expressive of his entire reconciliation and satisfaction with him, and shewing that the object of the transaction having been attained, he understood and considered the instrument as no longer subsisting and in force.

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Both points seem to me to concur in the present case. Upon the evidence, I think that the bond was not in the first instance intended to operate as a debt at all events: at any rate, the father, by his subsequent conduct and his mode of dealing, shewed that he did not mean it should now so operate; but that in fact he abandoned any claim in respect of it.

Under such circumstances, the authority of the cases referred to sufficiently establishes the jurisdiction of the Court to deal with the instrument in question. There must, therefore, be a decree that the bond be delivered up to be cancelled.

1837.

July 25.

CARR v. APLEYARD.

A motion for leave to examine witnesses, and that publication may be in the meantime enlarged, after publication has actually passed, is not an application which comes within the meaning of the 3 & 4 W. 4. c. 94. s. 13., but ought to be made to the Court in the first instance.

THE Defendant having moved at the Rolls, that he might be at liberty to examine his witnesses in the cause, notwithstanding publication had passed, and that publication might stand enlarged accordingly, the Master of the Rolls, upon affidavits disclosing merits, made an order that publication in the cause should be enlarged until the last day of *Trinity* term then next. (a)

Mr. *Wakefield* and Mr. *Ellison* now moved that the order of the Master of the Rolls might be discharged.

The motion was principally argued upon the merits of the case, as they appeared from the affidavits filed on both sides. But one of the grounds on which it was also contended that the order made at the Rolls was erroneous, was, that the Master of the Rolls had no authority to make, as he had here done, an original order on the subject; the jurisdiction having by the effect of the thirteenth and fourteenth sections of the *Court of Chancery Regulation Act* (b) been exclusively vested in the Masters. The words of the thirteenth section, it was insisted, were quite explicit, and distinctly enumerated all applications for leave to enlarge publication, among the matters which were thenceforward to be referred to the consideration of the Master. When this objection was taken before Lord *Langdale*, his Lordship expressed his opinion, that though the case fell

(a) 1 *Keen*, 725.

(b) 3 & 4 W. 4. c. 90.

fell within the letter, it did not come within the spirit and meaning of the act.

1837.



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v.

APPLEYARD.

Mr. Parry, *contra*.

The LORD CHANCELLOR said, that although the language of the order, giving leave to enlarge publication, after publication had actually passed, was in the usual form, it was obviously not strictly accurate. The effect of the order made in such a case was to give leave to examine witnesses, notwithstanding that publication had passed, — as expressed in the terms of the original motion. His Lordship said he was not at all disposed to disturb the construction which Lord *Langdale* had put upon the thirteenth section of the statute: he was quite sure it could never have been intended that applications of this sort, which were often most delicate and special in their circumstances, should be sent, as if they were matters of course, to the Master's office.

The LORD CHANCELLOR, then, upon the effect of the affidavits, affirmed the order at the Rolls, and dismissed the motion.

1837.

June 16, 17.
24.

HOWELL v. HOWELL.

The account of rents given against a purchaser for value, who, after being in possession, is evicted by a party having a better title, ought not to extend to such rents as, without his default or neglect, might have been received, if no special case of fraud is made against him.

The decree for such an account ought to contain a direction for just allowance.

An admission by a Defendant in his answer, that he alone has been in the possession or receipt of the rents and profits of an estate since a time therein specified, will not, under a decree directing him to account for the rents received by him since that time, preclude him from shewing, in the Master's office, that a part of such rents was not received by him, but was paid by the tenants to other parties.

THE Plaintiff, *Thomas Howell* the younger, by his bill claimed, under the marriage articles of his grandfather *Thomas Howell* the elder, to be entitled, as tenant in tail in possession, to an estate in the county of *Carmarthen*, and to receive the rents and profits of the estate from the time of his grandfather's death, in the year 1821, when his own title was alleged to have accrued. The principal Defendant was a purchaser for value. Some of the other Defendants were persons interested as legatees in a sum of 1600*l.*, which 'the will of *Thomas Howell* the elder had charged upon the same estate.

An issue was directed for the purpose of determining whether the purchaser, at the time of his purchase, had notice of the existence of the articles; and the jury having found in the affirmative, the cause came on, before the Vice-Chancellor, for further directions, on the 20th of *February* 1835. The decree then made, after declaring the title of the Plaintiff, directed an account to be taken of the rents and profits of the estate, accrued since the death of *Thomas Howell* the elder, which had been possessed or received by the Defendants, or any or either of them, or by any person for their use, "or which, without their default or neglect, might have been possessed or received by the Defendants or any or either of them;" and it contained no clause authorising the Master to make to the parties all just allowances.

Upon

Upon the prosecution of this decree in the Master's office, a passage was read from the answer of the Defendant the purchaser, in which he admitted "that he alone did on or about the 25th of *March* 1822, but that the other Defendants did not, nor did any of them enter into the possession or receipt of the rents and profits of the estate" in question, and that "he had been in possession or receipt of the rents and profits of the said estate, from time to time, since the said 25th day of *March* 1822," and that he was "still in the possession thereof." Upon this admission, the Plaintiff sought to charge the purchaser with the full amount of the rents of the estate from *Lady-day* 1822, the time when he first took possession. The purchaser, in order to discharge himself, produced the affidavits of several of the tenants, who stated that for a considerable portion of the time, during which the purchaser had admitted himself to have been in possession, they had paid their rents, not to him, but to the legatees; and that the rents were so paid, under the fear of a distress, and in consequence of the legatees insisting upon their right to receive them, in lieu of the interest due upon the sums charged on the estate for their benefit.

The Master held, that upon the terms of the decree directing an account of what the several Defendants might have received without their default or neglect, and giving him no authority to make just allowances, he was bound to charge the purchaser with the receipt of these rents: and he further held that, even if the decree had been otherwise, he was not at liberty to receive evidence, which he considered to be at variance with the admission made in the Defendant's answer. He therefore charged the purchaser with the whole of the rents, including those which had been paid

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paid by the tenants to the legatees, from the time when he first was let into possession.

The purchaser then presented an appeal from his Honor's decree, and he also took an exception to the Master's report. The appeal and exception were set down to be argued together: the appeal was brought on first.

Mr. *Wigram* and Mr. *John Wilson*, for the appeal.

The decree is erroneous in directing against the purchaser an account of the rents, which might have been possessed or received without his default or neglect, and inasmuch as it contains no authority to the Master to make to the parties all just allowances. The ordinary form of decrees, directing a specific performance, or a conveyance to a person who establishes his title in this Court, never directs any account of what might have been received without default or neglect; *Monypenny v. Bristow* (a), *Fane v. Spencer* (b), *Masters v. Braban* (c); the latter of which is a very strong case, for there the party called upon to account for the rents had got into possession under a forged instrument; *Callaghan v. Lord Lismore*. (d) No precedent can be produced of a decree charging a purchaser for value, in the situation of this Defendant, with what he might have received without his default or neglect; nor is any such direction ever introduced, save in the single instance of a mortgagee in possession, or in a case where positive fraud and breach of trust have been alleged and proved, in which latter case the Court proceeds against the Defendant solely upon the principle of punishment. The case of a mortgagee

(a) 2 *Russ. & Mylne*, 117.

(c) *Set. on Dec.* 221.

(b) *Set. on Dec.* 212.

(d) 1 *Beat.* 223.

mortgagee in possession has always been considered anomalous; but the Court views him in the light of a bailiff for the owner of the equity of redemption, and charges him accordingly. In order to charge a party with what, but for his default, he might have received, there must be a special case made; and the rule is the same at law; *Dunn v. Large*. (a) No fraud or misfeasance was proved or even alleged here, the notice which the Defendant had of the Plaintiff's title being merely constructive; and it would, therefore, be contrary to every principle of equity, as well as to the settled rule of the Court, that he should be charged in the manner which is ordered by this decree.

If the decree had contained a direction as to just allowances, the Master might have included the payments made by the tenants to the legatees under that head, but the Master was of opinion he had no authority to do so in the absence of such a direction. How the direction has come to be omitted in the present instance it is difficult to conjecture; for certainly the liberty to make just allowances is absolutely necessary, to enable the Master to do justice between the parties; and accordingly it is introduced, almost as a matter of course, into every decree for an account, unless a case of gross fraud or misconduct has been established, so as to justify the Court in proceeding vindictively against the accounting party. Upon the decree as it now stands, the Defendant would be liable for any damage to the estate which might have been occasioned by a tempest or a flood. If a barn had been blown down, or an embankment swept away, he would be chargeable with the whole loss, the Master having

no

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(a) 3 Dougl. 335.

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no right, without the special authority of the Court, to take the circumstances into his consideration.

Mr. Jacob and Mr. Puller, *contra*.

It is not correct to say that the words "without default or neglect are inserted only in a case of *mala fides*, and by way of punishment for a Defendant's misfeasance. What the Court looks to, is not the punishment of the Defendant, but the full compensation to the Plaintiff. A mortgagee in possession, it is admitted, is always so charged, although he has committed no breach of trust, but has obtained possession under a title both legal and equitable. The distinction is between cases in which the Defendant has had the sole and exclusive possession, and those in which his possession has been limited and partial only. That distinction is recognised by Lord Eldon in *Rowe v. Wood* (a), in comparing the relative situations of a mortgagee and a partner. Even in the case of a trustee, which ought to be most favoured, as his office is onerous and purely gratuitous, any one act of neglect or default will deprive him of his privilege, and subject him to the necessity of a strict account: *Shepherd v. Towgood*. (b) In *Wilson v. Clapham* (c) Sir Thomas Plumer, speaking of the case of a vendor continuing in possession after the time for the completion of the purchase, asks, "Is not the vendor to be responsible for the rent that he is said to have suffered to go into arrear for three or four years, which he most probably would not have permitted, if he had been holding the possession for himself?" In that case, the decree was, that the vendor should account for rents received, or which, without his wilful default, might have

(a) 2 J. & W. 553.

(b) 1 Turn. & Russ. 379.

(c) 1 Jac. & W. 36.; and see *Foster v. Deacon*, 3 Mad. 394.

have been received, during the period for which the purchaser abstained from taking possession in consequence of the defects in the title appearing on the abstract. The clause as to just allowances is mere surplusage; but it would undoubtedly have been inserted in the decree, if the Defendant had thought fit to ask for it.

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 *.
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Mr. *Wigram*, in reply, referred to *Pulteney v. Warren* (a), *Forder v. Wade* (b), and *Edwards v. Morgan* (c), affirmed in the House of Lords on appeal (d), as shewing the disinclination of the Court in any case to carry back even the ordinary account of rents, against a party who has been wrongfully in possession, to a period antecedent to the filing of the bill.

The LORD CHANCELLOR said it was quite new to him, that a party who stood in the situation of this Defendant, should be charged for what he might have received without his wilful default. No case had been produced in which that had ever been done. He should be glad to know what were the terms of the decree in *Pulteney v. Warren*, which was a suit for mesne profits, where the Plaintiff, through the fraud of the party, in setting up a defence at law, which eventually turned out to be unfounded, had lost his legal remedy. It was a case apparently more in point than any of the others which had been referred to. But, unless some precedent were produced, he could not maintain the present decree.

The

(a) 6 Ves. 72.

(b) 4 Bro. C. C. 521.

(c) 15 Price, 782. 1 Maccl. 541.

(d) *Morgan v. Edwards*, 1

Bligh, N. S. 401.

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v.
HOWELL.

The exception was then brought on, it being understood that, for the purpose of the argument, the decree should be treated as if the words, "without default or neglect," were struck out.

Mr. *Wigram* and Mr. *John Wilson*, submitted that the passage in the answer, upon which the Plaintiff relied, was no more than the common form in which a party admits that he has taken, and continues to have possession of property. It did not necessarily follow from that admission, that the Defendant was in undisturbed and exclusive possession of every part of the estate, or that he had received the whole of the rents. The admission was in the alternative, "in the possession *or* receipt of the rents and profits of the estate," and he might well be in possession of the estate without receiving all the rents. The Master, therefore, was wrong in rejecting the affidavits of the tenants upon this point.

Mr. *Jacob* and Mr. *Puller*, *contra*, submitted, that if the purchaser allowed the tenants to pay the rents to the legatees, it must be considered as a payment to himself, and that the possession of the estate, admitted generally, necessarily implied the receipt of the rents and profits by the party who made such an admission.

The LORD CHANCELLOR said these words were in the ordinary form. The Defendant thereby made himself liable to account for all the rents which he might be proved to have derived from the estate, from the time when he admitted his possession to have commenced; but he plainly never meant, by that admission, to acknowledge that he had received every portion of the rents from that time. And so the decree assumed; for it directed the Master to take an account of what might

might have been received by *any or either* of the Defendants, from the time when the Plaintiff's title accrued; whereas if the admission in the answer had been understood as the Master had construed it, instead of referring to the receipts of the other Defendants, the decree ought to have charged this Defendant with the whole. If that were the right construction, all that the Plaintiff would have to do, would be to ascertain the yearly amount of the rents, and multiplying them by the number of years for which possession was admitted, charge the accounting party with the total. The exception must be allowed.

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HOWELL
v.
HOWELL.

Upon the point raised by the appeal, his Lordship said he should direct the Registrar's book to be searched for the terms of the decree in *Pulteney v. Warren*.

The LORD CHANCELLOR.

June 24.

This was a case of adverse possession, the Defendant who is sought to be charged, having an apparent title, which, however, was defeated by an equitable settlement, under which the Plaintiff took an estate tail in the property in question. The result has been, that though the Defendant purchased and paid for the estate, a jury has found that he took it with notice of the settlement; and he has consequently lost the benefit of his purchase. There are no special circumstances in the case, beyond the fact of the Defendant having purchased with notice.

The question then is, whether it is consistent with the practice, that the decree should charge the Defendant with the rents and profits which might have been received without his default or neglect. The introduction of these words at once struck me as unusual;

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and I have ascertained on inquiry that no precedent for it can be found, this being neither the case of a mortgagee in possession, nor of a trustee against whom a special breach of trust is charged. With this view, I was desirous of ascertaining the terms of the decree in *Pulteney v. Warren*, and I directed a search to be made in the Registrar's book ; but, on inquiry, it appears that the decree in that case was never drawn up.

Under these circumstances, no case being cited in support of such a decree, and all the precedents and the practice being against it, I cannot permit the decree to stand.

I am further of opinion that a clause should be inserted empowering the Master to make just allowances : in short the decree must be such a decree, and in such a form, as is usual in a case where there are no special circumstances.

It is clear that, in point of form, I can make no order upon the exception, the decree on which the report was founded having been so materially varied, that it can no longer be considered as the same decree upon which the Master has proceeded ; but it may save future discussion and exception that the matter has been now brought before me, and that I have expressed an opinion upon it.

1837.

LLOYD v. MASON.

July 19.

THE Plaintiff, in right of his wife, was entitled to a share of the proceeds of a real estate, which, subject to a life interest, had been devised upon trust to be sold, and the proceeds divided among a number of persons. One of the Defendants, *Campbell*, who was also entitled to a share of the same proceeds, in his wife's right, and who claimed several other shares, as representing other parties, got into possession of part of the estate during the lifetime of the tenant for life. The tenant for life died in the year 1831, and in the month of *November* 1834, the present bill was filed, praying a sale and distribution of the proceeds of the estate, and an account of the rents received by *Campbell* since the death of the tenant for life.

The Court will not, by an interlocutory order before the hearing, charge a party who is in possession of an estate, and who has been ordered to pay an occupation rent to the receiver, with the amount of such rent for any period antecedent to the date of the order for fixing the rent and appointing the receiver.

Upon the coming in of *Campbell's* answer, the Vice-Chancellor, on the 18th of *May* 1835, made an interlocutory order, founded on the admission of possession contained in his answer. By this order, the Master was directed to fix a proper sum to be paid annually by way of occupation rent, in respect of the premises in the occupation of the Defendant *Campbell*; and it was ordered that what the Master should certify to be a proper rent, should be paid by *Campbell*, half-yearly, to the receiver to be appointed; and it was further ordered, that the Master should appoint a proper person to be receiver of the rents and profits of the estate.

The Master having reported that he had appointed a receiver, and that 100*l.* per annum was a proper sum to be paid by *Campbell*, by way of occupation rent, for that

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v.

MASON.

that part of the property of which he was in the occupation, the Plaintiff obtained an order, at the Rolls, that *Campbell* should pay into Court the sum of 500*l.*, being five years occupation rent, calculated from the decease of the tenant for life to the 25th of *December* last.

Mr. *Sharpe*, on behalf of the Defendant *Campbell*, now moved that the order made at the Rolls might be discharged. He submitted that, until an occupation rent was fixed by the Master, *Campbell* could not be considered or dealt with as a tenant of the estate, in which character alone he was to be charged with the rent; and, as a tenant, he could only be liable for rent accrued after his tenancy commenced.

Mr. *Rogers*, *contra*.

The LORD CHANCELLOR said the order appealed from was erroneous, inasmuch as, before the hearing, it directed a party who was in possession as equitable owner of a share of the property, to pay an occupation rent for a period antecedent to the order for fixing the occupation rent and appointing a receiver. The latter order was the origin of his tenancy; and consequently his liability to rent could only commence as from that date. The character of his previous possession, and the mode in which he was to be charged in respect of it, were matters to be considered and dealt with at the hearing. The order must therefore be varied to that extent, and the direction for payment be confined to the rent which had accrued subsequently.

REPORTS

OF

CASES

ARGUED AND DETERMINED

1837.

IN THE

HIGH COURT OF CHANCERY.

DOBREE v. SCHRODER.

1837.
Feb. 11.
March 3.

ON the 3d of *November* 1831, a ship called the *Julie*, was run down and sunk by a steam vessel called the *Lord of the Isles*.

By the act 53 G. 3. c. 159. the liability of a shipowner for damage done by his ship, without his fault or privity, to another ship, is limited to the value of the ship doing the damage, and her appurtenances and freight:

Two actions for damages were then brought against the owners of the *Lord of the Isles*; one by the owners of the *Julie*, and another by the owners of the cargo which she had on board at the time of the accident. In both actions, verdicts and judgments were recovered by the Plaintiffs at law, viz. in the former, for 2200*l.*; and in the latter, for 8568*l.* The owners of the *Lord of the Isles* then filed the present bill, against the Plaintiffs in those actions, for the purpose of obtaining the benefit of the act 53 G. 3. c. 159., by limiting the extent of their liability to the value of the *Lord of the Isles*, and of the

freight
Held, that the value of the ship doing the damage is the price at which she could be sold; her cost price,

and that price must be ascertained, not by making deductions from her cost price, but by a valuation and appraisalment.

1837.

DOBREE

v.

SCHRODER.

freight of the voyage which was in the course of prosecution at the time of the accident.

The Vice-Chancellor, upon the motion of the Defendants in equity, referred it to the Master to enquire what was the value of the *Lord of the Isles*, and her appurtenances and freight, on the 3d of November 1831. (a)

The Master, by his report, found, that the value of the *Lord of the Isles*, on that day, was the sum of 10,500*l.* : but it appeared, by a memorandum made by him, that the principle upon which he proceeded, in estimating that value, was, to ascertain the value, supposing the *Lord of the Isles* to have been run down and sunk by another ship on the 3d of November 1831, and an action to have been brought, by the owners, for damages for the loss of their ship ; and that he had endeavoured to satisfy his mind, as to what a jury would, upon the trial of such an action, have given as the value of the vessel ; and that, upon the examination of the evidence, he had made up his mind to fix the value at the sum already stated. The Master then stated the evidence upon which he chiefly proceeded ; which was that of persons who had inspected the *Lord of the Isles* in the month of July 1833, and who estimated her value by reference to her condition at that time, and to her original cost, and to her age at the time of the accident.

The Plaintiffs excepted to the Master's report ; but before the exceptions could be heard, the Defendants moved, before the Vice-Chancellor, that the Plaintiffs might be ordered to pay into Court such a sum as would, when added to the sum already paid in by them, amount to the

(a) See 6 *Sim.* 291. where the case is more fully stated.

the value of the *Lord of the Isles*, as found by the Master. The Vice-Chancellor having refused this motion with costs, the Defendants gave a notice of motion before the Lord Chancellor, by way of appeal from his Honor's decision; and it was then arranged, that the exceptions should come on to be heard before the Lord Chancellor, and that the motion should stand over until the exceptions should have been disposed of.

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DOBBEE
v.
SCHRODER.

The exceptions now came on to be argued.

The argument turned upon the question, whether the value of the *Lord of the Isles*, at the time of the accident, was to be ascertained by taking the cost price, and then making deductions from that price, for wear and tear, calculated at certain rates, or by evidence as to the price at which she could have been sold in the market at that time.

The Solicitor-General and Mr. J. Russell appeared in support of the exceptions.

Sir W. Horne, Mr. Wigram, and Mr. Teed, in support of the Master's report, argued, that the *Lord of the Isles* must be considered to have been worth, when new, whatever she might have cost; and that, if a different mode of estimating her value were adopted, it would be necessary to suppose that every body gives more than its worth for every thing he buys. Supposing this vessel had been run down on the very day on which she was launched, would it not be fair to say that her value was her cost price; unless some gross overcharge in the price could be proved? She must be deemed to have continued to be worth her cost price, except to the extent to which it can be calculated that she would have deteriorated

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 DORRIS
 v.
 SCHRÖDER.

riorated by age. *Wilson v. Dickson (a)*; *Gale v. Laurie (b)*.

The LORD CHANCELLOR.

The Master has taken an erroneous view of the matter referred to him.

The object of the act of parliament was to provide that the owners of the vessel should not be liable, beyond the value of the property engaged in the adventure at the time at which the accident happened, that is, the value which the property occasioning the loss or injury was capable of producing. In the common acceptance of the term, the value is the price which the property would fetch: and so it has been considered, in the only two cases to which my attention has been drawn. In *Gale v. Laurie (c)*, the ship was in the first instance the subject of a valuation in the Court of Admiralty; and the case states that "thereupon the *Dundee*, her tackle, apparel, and furniture, were valued and appraised at the sum of 2685*l.*, and the fishing stores at the sum of 2236*l.*" It is quite clear that the ship, there, was the subject of valuation and appraisement, not of calculation and deduction. That case is only material so far as it shews that the ship was the subject of valuation and appraisement. In *Wilson v. Dickson (d)*, Mr. Justice Bayley says, "It has been argued, that the owners of the cargo trusted the owners of the ship to the amount of the value of the ship before she sailed, and that therefore they ought to continue liable to that extent; but it must be recollected, that their responsibility is limited also in like manner in the case of damage done to any other ship by collision, &c.; and it being,

(a) 2 B. & Ald. 2.

(b) 5 B. & C. 156.

(c) 5 B. & C. 156.

(d) 2 B. & Ald. 2.

being obvious that this argument could only apply to the one class of cases and not to the other, both being included in the same clause, it follows that the argument is not entitled to any weight. Upon the whole, therefore, it seems to me that the words, 'the value of his or their ship or vessel,' must, unless there are some other words to control them, mean the existing value at the time when the loss takes place: the mode of ascertaining that value is a matter of evidence, and may possibly be attended with some degree of difficulty. If the ship ultimately arrive, by ascertaining her then value, you may easily find the value at the time of the loss; in other cases, when the exact time of the happening of the injury is uncertain, the Plaintiff may launch a *prima facie* case, by shewing the value at the time of sailing, leaving it to the opposite party to shew what deterioration had taken place. That, however, is mere matter of evidence, and no positive rule can be laid down upon the subject; and possibly (I only say possibly) the legislature, from motives of policy, might think that persons who had embarked their property in shipping, should, on giving up all they had ventured in a particular voyage, be relieved from any further responsibility."

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It is quite clear that it never occurred to Mr. Justice Bayley that there was any other mode than that of ascertaining the value of the ship at the time at which the loss or accident happened. If it had occurred to him, that the proper mode of ascertaining the value was to take the original cost, and then to make certain regular deductions, the difficulty he supposes would never have arisen, and it could not have been necessary for him to point out a mode of avoiding it. It would have only been necessary to get the bills of the tradesmen by whom the ship had been built and fitted

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up; and, having ascertained the aggregate amount of those bills, to have made certain deductions, in proportion to the ship's age.

That a valuation and appraisement is the proper mode of ascertaining the value of the ship, is clearly the meaning of the act; and such it has been considered to be in the two cases to which I have alluded. The other mode has this objection; that it never can be applied with certainty to any two cases. In one case, a ship may have been purchased advantageously and employed disadvantageously; in the other, it may have been obtained disadvantageously, and employed advantageously. There would be no two cases of estimating the value which could both be depended upon: and besides, such a mode of ascertaining the value would be contrary to the meaning and intention of the legislature, and to the construction which has been put upon the act. It is clear, therefore, that the Master has gone upon a wrong principle.

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HORLOCK v. BENNETT.

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YARDE v. PRIESTLEY.

WILLIAM YEMS, one of the Defendants in the four first mentioned causes, employed *Benjamin Goode* and *Philip Goode*, as his attorneys and solicitors, from the year 1818, downwards, in the recovery of the arrears of a certain annuity, and, subsequently, as his solicitors in the four first above-mentioned causes. The annuity was charged upon the lands which were in question in all the above mentioned causes. *Yems* died, intestate, in the month of *September* 1833; and on the 12th of *October* 1833, *Mary Elizabeth Thomas*, wife of *John William Thomas*, and *Anne Yems*, obtained letters of administration to his effects; and they were made Defendants to the two last above-mentioned causes, which were causes of revivor.

If a client, having paid his solicitor's bill of costs, without pressure or undue influence, wishes afterwards to have it taxed, he must state in his petition, and prove by evidence, that the bill contains such grossly improper charges, as furnish evidence of fraud; and the petition must point out the particular items to which that description applies, and those items must be proved by evidence to answer the description.

Thomas and wife, and *Anne Yems* now presented a petition to have Messrs. *Goode's* bills of costs taxed.

The petition stated that in the course of the year 1835, Messrs. *Harris* and *Rye*, the petitioners' solicitors, made

An allegation that a solicitor has received monies on account of his client, for which credit has not been given in the settlement of a bill of costs, is not sufficient, although supported by evidence, to warrant an order for the taxation of the bill.

Principles of the Court with respect to the taxation of a solicitor's bill after payment.

The petition then went on to state that *Thomas* thereupon paid to Messrs. *Goode* the sum of 510*l.* 14*s.* 10*d.*, the balance of the account, and required to have delivered to him all papers and documents in the possession of Messrs. *Goode* belonging to *W. Yems*; whereupon Messrs. *Goode* delivered to the petitioners' solicitors some of such papers, and promised to deliver over the remainder in a short time; that Messrs. *Goode*, afterwards, in the month of *October* 1835, delivered to Messrs. *Harris* and *Rye* some of those papers, after many importunate applications; but that they still retained in their hands many of such papers and documents, received and prepared in the above-mentioned causes, which belonged to the petitioners, and for which the petitioners had been charged in the bills of costs.

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The petition alleged, that the petitioners were unable to ascertain the reasonableness and propriety of the charges comprised in the bills of costs until they had examined the papers so received from Messrs. *Goode*; and that the bills of costs contained many charges which were unreasonable and exorbitant in amount, and many other charges which ought not to be contained therein, and which would be wholly disallowed on taxation, and also several charges for business which was not done for or on behalf of *W. Yems*, and which purported to have been done on behalf of other persons; and that the bills of costs also contained many charges for business and journeys which ought not to have been done or taken; and, in particular, for journeys, time, and attendance in or about the trial of an action of *Doe on the demise of Priestley v. Calloway*, at the assizes at *Northampton*: and that Messrs. *Goode* had not produced any vouchers or accounts of the application of certain sums of money which they had or ought, and which it appeared, by the bills of costs, they had, or ought to have received, on account of, and

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to have paid to, or carried to the credit of *W. Yems* or the petitioners; and that, if the bills of costs were taxed, and credit allowed for the sums of money received, or which ought to have been received, by Messrs. *Goode*, on behalf of *W. Yems*, there would be a considerable sum of money due from Messrs. *Goode* to the petitioners.

The petition prayed the taxation of the bills, and the production of all papers in Messrs. *Goode's* possession relating to the bills, and an account of all sums received by Messrs. *Goode* on account of *Yems*, and from the petitioners, in relation to or in the course of the business done by them, and on account of the bills; and that Messrs. *Goode* might refund whatever might appear to have been overpaid to them, and that they might deliver up to the petitioners, on oath, all papers in their custody or power, belonging to the petitioners.

The petition was presented on the 23d of *July* 1836. The allegations which have been already quoted from it were supported by the affidavit of Mr. *Harris*, filed on on the 27th of *July* 1836, in which he also stated that at the meeting before mentioned, at which the bills were settled, the petitioner, *John W. Thomas*, requested explanation concerning the sum of 70*l.* alleged to have been borrowed by *Yems* of Messrs. *Goode*, and required the memorandum given by *Yems* to Messrs. *Goode* to be handed over, which Mr. *P. Goode* then declined to do, and retained it until the month of *October* 1836; and that, being in immediate want of the papers for the purpose of the suits, *John W. Thomas* paid Messrs. *Goode* the sum of 510*l.* 14*s.* 10*d.*, being the balance of the account. The deponent further stated, that he had delayed proceeding to a taxation of the bills, in the expectation of receiving from Messrs. *Goode* the papers still

still remaining in their hands; that on the 23d of *May* 1836, he received a communication from Messrs. *Goode* requiring him to point out the particular papers not delivered over; that, in consequence of that communication, he caused a list of such papers to be prepared and sent to Messrs. *Goode*; that on the 21st of *July* 1836, Mr. *Philip Goode* requested of the deponent further time for the delivery of the last-mentioned papers; that on the following day (viz. the 22d of *July* 1836), Messrs. *Harris* and *Rye* wrote to Messrs. *Goode* a letter, stating that they had been instructed to procure a taxation of Messrs. *Goode's* bill of costs, and proposing that, if Messrs. *Goode* would consent to an order for taxation, time should be given to them until the 1st of *October* then next, to deliver over the papers remaining in their hands, and asking for an answer before noon of the next day; and that, on the 23d of *July* 1836, Messrs. *Goode* wrote to Messrs. *Harris* and *Rye* in the following terms: — “Gentlemen, — If, after the time that has elapsed since our bill against the late Mr. *Yems* was delivered, and paid by his representatives, and after a suggestion that it would have been more agreeable that it should have been taxed in the first instance, if so intended, you now see cause for taxation, let the same be disposed of by our respective clerks in court, on the commencement of business in the ensuing term, which will be sooner than the same object can be gained by any other course. We make this suggestion (if not acceded to) without prejudice. We are, &c., *B. and P. Goode.*”

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The deponent further stated, that in answer to the last letter, Messrs. *Harris* and *Rye* wrote to Messrs. *Goode*, on the 25th of *July* 1836, informing them that, not having received any reply to their letter of the 22d instant, at the time they requested, they had been under
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the necessity of presenting the petition, and now forwarded them copies of it; and saying, that if Messrs. *Goode* thought fit to consent to an order, Messrs. *Harris* and *Rye* had no objection that the taxation should stand over until the ensuing term; and adding, that the delay in proceeding to a taxation had been wholly occasioned by Messrs. *Goode* withholding from the petitioners those letters and papers to which they were entitled.

The affidavit of *Mr. Philip Goode*, filed on the 4th of *August* 1836, stated, that the bill for 792*l.* 4*s.* 8*d.*, which was delivered on the 4th of *April* 1835, was for business done for *W. Yems* between the years 1818 and 1833; and that the subsequent bill of costs for 23*l.* 19*s.* 4*d.*, delivered on the 23d of *May* 1835, was for business done, partly for *Yems*, and partly for his personal representatives; and that the statement of his own and his partner's cash account with *Yems*, already mentioned, was sent together with the last-mentioned bill of costs; and that, upon the balance of 510*l.* 14*s.* 10*d.* being paid, he delivered over to *Mr. Harris* every material paper in the suits in equity, retaining such only as appeared to him necessary for the purpose of conducting the same for a Defendant named *Thomas Gaze*, for whom he and his partner then and still continued to be concerned in these suits; but that the deponent had not caused the papers relative to the business of the annuity, transacted so long ago as the years 1818 and 1819, to be looked out, as they did not appear to the deponent to be material.

The deponent further stated, that in the month of *May* 1836, Messrs. *Harris* and *Rye* applied to Messrs. *Goode* for the delivery of certain letters relating to the business of the suits, submitting that they were entitled to all the correspondence that had taken place during

during the progress of the business ; but that the deponent, Mr. *P. Goode*, on the 20th of *May* 1836, wrote to Messrs. *Harris* and *Rye* a letter, of which the following is an extract : — “ Allow me, in reply to your letter of the 11th inst., to refer you to ours of the 27th *October* last, wherein we communicated to you that such papers as we retained were so retained for the protection of the trustee (Mr. *Gaze*) ; but should you consider the same contained anything essential to the interests of your clients, the same should be made available as you might suggest : and this I repeat. If you, however, mean to insist upon your right to letters, I submit you are not entitled to the possession of them under any circumstances, and more especially as proceedings are still pending, and we remain concerned for a party in the cause. At the same time, any of the correspondence that you require to be produced, for any necessary purpose in the cause, shall be produced ; and any explanation you may require I shall at all times be ready to render. The papers I presume you refer to as not having been received, are those referred to in our letter, and comprised in the schedule of papers previously handed over to you.” The deponent added, that Mr. *Harris* afterwards inspected some of these letters at the deponent’s office, and was furnished with copies of them by the deponent.

The affidavit further stated, that the business alleged in the petition to have been done for other persons, and which was of trifling amount, was so done for the late Plaintiff *John Horlock*, and was charged for in the bill of costs, in conformity with an understanding between *Horlock* and *Yems* ; and that the journeys, time, and attendances, in and about the trial of the action *Doe on the demise of Priestley v. Calloway*, at the assizes at *Northampton*, charged for in the bill of costs, were rendered necessary by an order of the Court of Chancery, by which

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Horlock and *Yems* were made to undertake to appear on the trial, and to give facility to it; and that the journeys taken by the deponent to *Northampton*, upon the trial, and charged for in the bill, were taken at the express instance and request of *Yems*. The affidavit went on to state, that the levies referred to in the bill of costs, and all other monies received of or to the use of *Yems*, and for which credit was not given either in the bill of costs or in the cash account, to the best of the knowledge and belief of the deponent, were duly accounted for to *Yems* in his lifetime; that the disbursements connected with the business done and charged for in the bill of costs, amounted to 350*l.* and upwards; and that the charges in the bill of costs, were, in the judgment and belief of the deponent, fair and reasonable, and such as were usually made between solicitor and client; and that he believed that no intimation to the contrary (except a remark by *Mr. Harris* upon the necessity of attending the trial at *Northampton*), was ever given to him before the settlement of the bill, or at any time subsequently, until the receipt of the letter from *Mr. Harris*, of the 22d of *July* 1836: but, nevertheless, that the deponent did, on the occasion of discussing the propriety of delivering up certain correspondence, advert to the bills being taxed, and signified that it would be desirable, if intended, that such taxation should take place before the papers were delivered over; but that *Mr. Harris* did not then intimate any intention to tax the bills.

Another affidavit, sworn by *Mr. Harris*, and filed on the 22d of *November* 1836, stated that he verily believed that three particular sums of money mentioned in the bill of costs, viz. 151*l.* 10*s.* 8*d.*, 83*l.* 5*s.* 6*d.*, and 15*l.* 13*s.* 6*d.*, had been levied in relation to *Yems's* annuity, and that no account, voucher, or document had been produced, shewing that those sums had been paid or accounted for to *Yems* or to his representatives; and that

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that credit for those sums was not given to *Yems* or his representatives, in the bill of costs, or in the cash account, or in any other account or document, and that the deponent believed that the Messrs. *Goode* had never accounted for those sums to *Yems's* representatives, and that he could find nothing among *Yems's* papers to shew that they had accounted for them to *Yems*. The deponent added, that neither of the Messrs. *Goode* suggested to him that the bills should be taxed, or referred to the taxation of them, before the 23d of *July* 1836, except that *P. Goode*, in resisting an application made by the deponent, on behalf of the petitioners, to one of the Judges of the Court of King's Bench, for the delivery of the memorandum for 70*l.* given by *Yems* to Messrs. *Goode*, and of certain other papers, insisted that he was entitled to retain the memorandum as a voucher, in case the petitioners should require his accounts to be investigated. It appeared from a subsequent affidavit of Mr. *Harris*, filed on the 23d of *November* 1836, that he had submitted the bill of costs to Mr. *Smith*, the clerk in Court, who acted for *Yems's* representatives, and that the clerk in Court had specified various items which, in his opinion, and in the opinion of the deponent, would clearly be disallowed upon taxation.

Another affidavit by Mr. *P. Goode*, filed on the 20th of *December* 1836, stated that all the sums of money mentioned in the bill of costs as having been received by himself or his partner on account of *Yems*, were paid over or accounted for to *Yems* in his lifetime; and, with reference to the sum of 151*l.* 10*s.* 8*d.*, one of the sums in question, the deponent verified the stamped receipt of *Yems* for the amount, after certain deductions, the particulars of which were specified on the back of the receipt; and, with respect to the other sums in question, he deposed that those sums had been paid over

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over to *Yems*, together with an additional sum of 101*l.* 1*s.* then lent to *Yems* by Messrs. *Goode* for the purpose of making up 200*l.*; and the cheque for the latter amount, then given to *Yems*, was verified, and was sworn to have been presented by him or on his behalf, and duly paid, and bore an endorsement specifying the particulars which made up the sum of 200*l.*, and also an endorsement of *Yems's* name, in his own handwriting.

Mr. *Harris's* affidavit of the 22d of *November* 1836, so far as regarded his belief that certain sums had not been accounted for or credited by Messrs. *Goode* to *Yems*, was supported by an affidavit of the petitioner *J. W. Thomas*, filed on the 21st of *December* 1836.

The trial at *Northampton* was ordered by the Vice-Chancellor. The order, by the terms of which *Yems* was made to undertake to appear upon the trial and to facilitate it, was pronounced by the Court, and appeared upon the Registrar's minute book; but it was never drawn up. The trial, however, took place. (*a*)

On the 24th of *December* 1836, the Master of the Rolls made an order for the taxation of the bill of costs, in the common form.

Messrs. *Goode* now appealed from his Lordship's decision.

The *Solicitor-General* and Mr. *Stinton* in support of the appeal.

The order can be supported neither by principle nor by authority. The bill of costs was paid by the petitioners

(*a*) See 6 *B. & C.* 448.

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tioners voluntarily, and in the presence of their new solicitor, and without any expression of dissatisfaction; and the payment was acquiesced in from *May* 1835, to *July* 1836. It is said now, that the papers which Messrs. *Goode* retained, in order to enable them to carry on the suit for the party on whose behalf they continued to be concerned, were necessary to enable the petitioners to judge of the reasonableness of the charges; but there is no specific suggestion as to the manner in which the papers were material, in order to enable the petitioners to discover any error in the bill or in the accounts. All the decided cases prove that, to justify a taxation after payment, there must be improper conduct or pressure on the part of the solicitor, or grossly improper items upon the face of the bill, or that such errors or overcharges as amount to evidence of fraud must be distinctly pointed out and proved; *Drapers' Company v. Davis* (a), *Langstaffe v. Taylor* (b), *Plenderleath v. Fraser* (c), *Clutton v. Pardon* (d), *Gretton v. Leyburne*. (e) Nothing, however, can be more vague or general than the charges made by the petition; and it is clear, from Lord *Eldon's* observations in *Plenderleath v. Fraser*, that the circumstance that a bill may contain many items that would be disallowed on taxation, is not a sufficient reason why it should be taxed after payment; and acquiescence in that payment; still less can it be a sufficient reason, when the party paying the bill has had the advice of another solicitor at the time, who has examined the bill, and been present at its payment; and there has been no instance of a taxation having been ordered after a payment made under such circumstances. In this case, however, it cannot be said with truth, that any items would be disallowed on taxation; and, it is a principle

(a) 2 *Atk.* 295.

(d) *Turn. & Russ.* 501.

(b) 14 *Ves.* 262.

(e) *Ibid.* 407.

(c) 5 *V. & B.* 174.

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principle of the Court, to regard the rights of the solicitor as well as those of the client.

The charges made in the affidavits, with respect to the failure to give credit for monies received, are mere matters of account, and cannot be discussed upon a summary petition for the taxation of a bill of costs. The petitioners should rather have filed a bill to surcharge and falsify Messrs. *Goode's* accounts; but, at all events, those charges are triumphantly answered by the production of the receipt and the cheque.

Mr. *Wigram* and Mr. *Willcock*, in support of the order.

The right of a client to have the bill of costs taxed, notwithstanding payment, may rest, either upon the fact of the bill containing overcharges, or upon the circumstance that the relation between the parties at the time is such as to prevent the payment being conclusive. Messrs. *Goode* do not say that they are not now in exactly the same condition with respect to a taxation as that in which they were before the payment; they do not say that they have lost any vouchers, or any thing else. The only difference made by the fact of payment is, that a special order of taxation is necessary, instead of the common order. Payment is only a circumstance. Every case in which it has been decided, that a security taken for payment of costs shall stand only for so much as is properly due, is an authority in support of the present order. In *The Drapers' Company v. Davis* (a), seventeen years, and, in another case before Lord *Hardwicke*, twenty years had elapsed since payment (b), and yet a taxation was ordered. It is true, that in a case in which

(a) 2 *Atk.* 295.

(b) See 1 *V. & B.* 127.

which an action for the amount of the bill had been brought, and judgment had been recovered, a subsequent taxation was refused; but the ground of that refusal was, that the proper time for taxing the bills was the time at which the action was brought. (a)

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Nothing that has happened in this case, since the bill of costs was delivered, has deprived the petitioners of the right to a taxation; and, if they were entitled to have the bill taxed the day after it was delivered, they are entitled to have it taxed now. This is clear, from *Crossley v. Parker* (b), in which Sir Thomas Plumer went through all the cases upon this subject. In *Waters v. Taylor* (c), which now awaits your Lordship's judgment, the Vice-Chancellor ordered a taxation seventeen years after payment, upon the ground that there had been a pending litigation. In *Howell v. Edmunds* (d) the same principle was laid down as in *Crossley v. Parker*. In *Clutton v. Pardon* (e), Lord Eldon says, that the client may intimate that he pays the bill without prejudice to taxation; and that there may be cases where, without one word being said, he would have a right to have the bill taxed.

[The LORD CHANCELLOR.

Here the party gets all he wants: he gets all his papers, and then keeps it open to himself (for fifteen years, perhaps), to have the bill taxed. I understand the case you put to be that of the client paying the bill for the purpose of getting the papers which will enable him to have the bill taxed, without saying to the solicitor at the time, that he means to have the bill subsequently taxed.]

The

(a) *Plenderleath v. Fraser*, 3 V.
 & B. 174.

(b) 1 J. & W. 460.

(c) See p. 526. *infra*.

(d) 4 Russ. 67.

(e) *Turn. & Russ.* 301.

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The client would in such a case be entitled to an order for taxation if nothing has in the meantime altered the position of the parties. *Prima facie* the possession of the papers by the client is necessary to enable him to have the bill taxed; but in this case it is distinctly sworn that the examination of the papers was necessary to enable the petitioners to judge whether the bill ought to be taxed or not.

[*The LORD CHANCELLOR.*

Lord *Eldon* has laid it down as very clear law, that the mere circumstance of the bill being subject to taxation, is no ground for having it taxed after payment; but that there must be such clear and gross overcharges as amount to fraud. (a)]

In none of the cases upon this subject has the term "fraud" been used, as being essential in order to procure a taxation of a bill after payment; but if the bill has contained charges, which no solicitor dealing properly with his own client would have made, there has always been considered to be fraud, within the meaning of the cases upon this subject.

With respect to the allegation that the journeys to *Northampton* were undertaken at the express instance and request of *Yems*, it is to be observed, that although it is not contradicted, yet the only person who could contradict it, namely *Yems* himself, is dead.

The Solicitor-General, in reply.

It is not pretended that the old papers of the date of 1818 and 1819 were material to the taxation.

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(a) See 3 *V. & B.* 175.

The mere circumstance that the sums received by the solicitor might have exceeded the amount of the bill, would form no ground for taxation; it must be shewn that there is ground for taxing certain particular items in the bill.

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That may be tried by supposing the bill to contain no taxable item at all, but that the solicitor has received more money than he was entitled to retain in payment of the bill. That circumstance would not be a sufficient reason for taxing an otherwise untaxable bill.

The LORD CHANCELLOR.

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This case, and the case of *Waters v. Taylor (a)*, I consider as being of extremely great importance, both to the profession, and to the public at large, inasmuch as it is very desirable that the rules of this Court upon the subject of the taxation of solicitors' bills of costs should be well understood, not only for the protection of the public, but for the ultimate benefit of a large class of the profession to which these rules apply.

The Court will always be anxious, in every possible way, to protect the client against any improper dealing on the part of the solicitor; but it is absolutely necessary that some rule should be laid down, by which professional gentlemen shall know when they may consider their bills of costs as finally settled, and whether the money which they have received in respect of those bills is their own, or whether those bills are sub-

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(a) See p. 526., *infra*.

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ject to investigation or review upon the application of the client.

It requires, therefore, and all the cases shew that it requires, a strong case to be made against the solicitor, when the client applies for a taxation of the bill after payment; and when, after proper time and opportunity for investigating the items which the bill contained, he has thought proper to pay it. The Court will, no doubt, give relief after any length of time, if a case of fraud or improper conduct is made out against the solicitor; but it is quite necessary that it should be understood that the client is not, after payment, to have a taxation merely for asking for it.

The facts of this case appear to be these: Messrs. *Goode* were employed by the late Mr. *William Yems*, from the year 1818, in certain suits in which he was a Defendant, and they so continued to be employed until *September* 1833, when he died. The representatives of Mr. *Yems* did not think fit to employ Messrs. *Goode*; but Messrs. *Harris* and *Rye* were employed by them; and from that period, of course, Messrs. *Goode* ceased to be employed as the solicitors in those affairs. These gentlemen, Messrs. *Harris* and *Rye*, applied to Messrs. *Goode* for their bill against the late Mr. *Yems*' estate; and on the 4th of *April* 1835 a bill was delivered to the amount of 790*l.* On the 23d of *May* following another bill to the amount of 23*l.* was delivered; and accompanying this bill there was a statement of account, giving credit for certain sums as received; the balance of the account being 510*l.* due to the solicitors. On the 25th of *May*, being about six weeks after the principal bill was delivered, but only two days after the second bill for 23*l.* together with the cash account was delivered, the petitioners, that is to say the representatives

atives of the client, applied to have a meeting with Messrs. *Goode*, for the purpose of settling their account. It was investigated by them, as they thought proper to investigate it, and the balance of 510*l.* was paid, and Messrs. *Goode* were required to deliver up the papers belonging to the estate of Mr. *Yems*. Of course, some little time was required before they could be looked out and ascertained; and in *October* 1835 some of the papers were delivered to the representatives of Mr. *Yems*; but it appears that others were not then delivered.

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The petition states, that the petitioners were unable to examine the items in the bill, until the papers were delivered out, that is, until *October* 1835.

If it had been intended to support the case upon that allegation, it should have been distinctly proved; but no evidence was given upon the point: the statement is made in the affidavit in general terms; but no reason is stated to shew why the papers were necessary; and I must observe, that if that was the case, Messrs. *Goode* ought to have been informed of it, when the petitioners professed to settle the bill. A case, to which I shall presently have occasion to refer, will shew that that circumstance struck Lord *Eldon* as being matter of very serious observation. If the petitioners obtained the papers from Messrs. *Goode*, upon the supposition that the bill was finally settled, intending, however, to apply afterwards for a taxation, upon the ground of Messrs. *Goode*'s possession of the papers, but concealing that intention from Messrs. *Goode*, I think they ought not very easily to be allowed to take advantage of that circumstance at a future time. It was competent for them, if the papers were necessary to enable them to tax the bill, to inform Messrs. *Goode* of that necessity; that would have led to some settlement of the bill. The petitioners, however, obtain possession of the papers

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from Messrs. *Goode*, without any notice, leaving them under the idea that they had finally settled the account of their client; and then, after Messrs. *Goode* have parted with the papers which they were entitled to retain until the bill should have been taxed, the petitioners come here and apply for a taxation.

The petition contains a general allegation of improper charges, but specifies none, except the expences of two alleged journeys to *Northampton*; and then, afterwards, it says, that *William Yems* ought to have received credit for sums for which he did not receive credit; but no particular sum is specified in the petition. That is the whole of the petition. I conceive, and so it was considered by Lord *Eldon*, in several cases which came before him, that if an application is made to open a bill upon the ground of improper charge, the Respondent is as much entitled to have the particular items stated in the petition, as a Defendant to a bill, filed for the purpose of opening a settled account, is entitled to have the particular items on which the Plaintiff intends to rely stated in the bill. The Court must not only have something amounting, in the language of the cases upon this subject, to fraud, but also a distinct statement of particular items which shall enable the Respondent to meet the charge made by the petition: otherwise the greatest possible injustice may be done. If the Court gives credit to the statements in such a petition, it leads to an order for taxation; and then a large part of the bill may be taken off, upon strict taxation, which the solicitor might well be entitled to charge the client; at all events, if the client was aware of the amount of charge, and did not think proper to object to it. It is, therefore, absolutely necessary, in order to justice being done between the parties, that a client, applying to have his solicitor's bill taxed, should allege and prove specific errors, amounting to what the cases mean, when they speak of gross errors amounting

amounting to evidence of fraud. I am speaking, of course, of cases in which the client, without pressure or improper influence, with every means of examining the bill, thinks proper to pay it, and then afterwards applies for a taxation.

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The affidavits in support of the petition are a mere echo of the petition itself; except that one affidavit adds a letter of the 22d of *July* 1836, from Messrs. *Harris* and *Rye* to Messrs. *Goode*, threatening an application for a taxation; and a letter of the 23d of *July* from Messrs. *Goode* in answer, offering to leave the question to the clerks in Court; and a letter of the 25th of *July* from Messrs. *Harris* and *Rye* to Messrs. *Goode*, insisting upon taxation.

One of the Messrs. *Goode* makes an affidavit in answer, in which he says that the journeys to *Northampton* were rendered necessary by an order of the Court of Chancery, by which *Yems* was made to undertake to appear upon the trial of an action there; and that the journeys were taken at the express instance and request of *Yems*; and that the levies referred to in the bill of costs, and all others monies received of or to the use of *Yems*, and for which credit was not given, either in the bill of costs, or in the cash account, to the best of the knowledge and belief of the deponent, were duly accounted for to *Yems* in his lifetime.

That is meeting the allegation, of monies alleged to be received and not credited, by a general averment, as the allegation in the petition is general; and when additional papers were applied for by Mr. *Harris*, no intimation was given of any intention to tax the bill, though Mr. *Goode* said that if there was any such intention, it should be done before the papers were delivered out.

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In answer to this statement, Mr. *Harris* makes an affidavit, which was filed on the 22d of *November*, and then, for the first time, he opens the complaint, by specifying items for which he alleges that credit ought to have been given. He says that there were three sums of 15*l.* 10*s.* 8*d.*, 83*l.* 5*s.* 6*d.*, and 15*l.* 13*s.* 6*d.*, which it appears from the items in the bill of costs had been received for the benefit of Mr. *Yems*, but which had not been credited in the account. This affidavit, however, does not make any new complaint as to the items in the bill of costs : but in a subsequent affidavit Mr. *Harris* says that Mr. *Smith*, the clerk in Court, had examined the bill, and had reduced it, as it would seem, by a very considerable sum.

It is quite obvious that no attention whatever can be paid to the statement of Mr. *Smith's* opinion. In the first place, it is the case of one man swearing to another man's opinion. Mr. *Harris* does not state any particular items ; and at most, if credit were to be given to the statement, it only amounts to this, that this is a bill, paid without taxation, which, if taxed, would be reduced. That, probably, might be said of almost every bill ; and, as will be seen by the cases to which I shall refer, forms no ingredient in the reasons upon which the Court has opened the bill and ordered taxation. Then Mr. *Goode* makes an affidavit, in which he explains the circumstances with respect to the three sums so alleged to have been received without being credited ; and, at the hearing of the petition before me, receipts were produced, signed by *Yems*, in which all these sums are specified in detail ; and under his hand there is an acknowledgement of the application of the balance.

In this state of the evidence, on the 24th of *December* 1836, an order was made, referring the bill for taxation.

The

The state of the dealings between the parties being such as I have mentioned, it remains to be seen what authority there is, as applicable to that state of circumstances. There are three or four cases in which Lord *Eldon* has maturely considered this subject; and I will take these cases in order. The first in point of time is *Langstaffe v. Taylor*. (a) There, an action had been brought upon the bills, and there had been judgment by default, upon which the client had been taken in execution in 1803, and a petition to tax the bills was not presented until 1807. The petition contained allegations that the charges were exorbitant and improper; but no specific errors were pointed out. Lord *Eldon* said that neither payment of the money, nor a release, nor a judgment for the demand, would preclude taxation, if it were shewn that the business had not been done, or that the charges were fraudulent. Lord *Eldon* refused to make any order upon the petition, because it did not allege specific errors. He was at first disposed to let the case stand over, to enable the petitioners to bring forward any case of exorbitant or improper charge; but, afterwards, having consulted some of the Judges, he dismissed the petition.

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The next case, in point of date, is *Cooke v. Setree*. (b) There, the bills had been delivered, pending the relation of solicitor and client, and pending a suit, and bonds given, and an action brought upon them, and an injunction granted to restrain proceedings in the action; and an application was made to dissolve the injunction. Lord *Eldon* did dissolve the injunction, and expressed himself thus: "Even after payment, if the client can point out in the bill gross errors, charges amounting to imposition and fraud, the Court will open the whole;" but he says,

(a) 14 Ves. 262.

(b) 1 V. & B. 126.

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says, "where there is no fraud, imposition, or evidence of undue pressure or influence, and the proceeding at law has gone to judgment and a writ of error, the question is reduced to this: if there have been subsequent dealings, in respect of which it can be made probable, that there has been any receipt, that ought to be taken in discharge of the bond, that may form a ground for inquiry;" but, being of opinion that in that case there was not such evidence of omission of credits as would probably lead to a result favourable to the client, he did not make any order for that inquiry.

That case very much resembles this in many respects; there were allegations of improper charges; but no specific items were pointed out, as being founded in imposition, fraud, or even error: none, therefore, of which the Court could take notice. There was some evidence of items of credit having been omitted; but Lord *Eldon* did not consider that that was a reason for sending the bill to be taxed, but, if made out, a ground for distinct inquiry as to what sums had been received which ought to have been set off against the amount of the bill. That observation applies, therefore, directly, to the three sums for which it is in this case alleged, that credit was not given. If a case had been made out with respect to those three sums, it might be a very proper inquiry, whether sums had not been received, which ought to have been credited to the client, and so go in part discharge of the bill of costs; but, according to Lord *Eldon*'s judgment in *Cooke v. Setree*, if there is no objection to the bill of costs itself, there is no ground for the taxation of the bill of costs itself.

The next case, in order of time, is *Plenderleath v. Fraser*. (a) There, Lord *Eldon*, in the year 1814, refused

(a) 3 V. & B. 174.

fused the taxation of a bill delivered in *December* 1811, for which a bond had been given in *February* 1812, and upon which bond an action had been brought, and the money paid; saying, "where, payment having been made of a solicitor's bill, it has been long acquiesced in, the Court will not direct taxation, unless very gross charges are distinctly pointed out;" and, thinking that the charges, although in some respects improper, did not amount to fraud, he refused the application.

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In *Clutton v. Pardon (a)*, Lord *Eldon* says, that a client, by paying the bill, does not necessarily waive the right to taxation; that he may intimate that he pays it without prejudice, and that there may be cases, where, without one word being said, the client would have a right to have a bill taxed; and he observes upon the fact, that the papers had been obtained from the solicitor, upon payment, without any intimation that there was to be a taxation. That fact occurs in this case.

These are the whole of the cases which were referred to as having come under the consideration of Lord *Eldon*; and it is to be observed, that none of them supported the order of taxation upon the general allegation of improper charges, when payment had been made, after the relation of solicitor and client had ceased, and when the client had the assistance of another solicitor. In support of the order in the present instance, one case before Sir *John Leach*, *Howell v. Edmunds (b)*, was cited. There, the bill was paid six months after it had been delivered, and the application for taxation was made eight months after payment. A taxation was ordered, upon the ground, not only that the suit was pending when the bill was paid,—from which circumstance alone
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(a) *Turn. & Russ.* 301.

(b) 4 *Russ.* 67.

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Sir *John Leach* said that influence and pressure would be presumed — but also that there had been actual pressure, by a threat from the solicitor to arrest the client. That case was decided upon the particular circumstances belonging to it. It certainly appears to lay down a proposition, to which it is not necessary to advert here, namely, that a bill paid during the pendency of a suit will be opened, inasmuch as from the pendency of the suit, pressure will be inferred; which, perhaps, may admit of qualification; but Sir *John Leach* did not decide that particular case upon that ground, because he found evidence that there had been actual pressure.

Two cases decided by Sir *Thomas Plumer* were cited. The first of these is *Gretton v. Leyburne* (a). In that case, the bill was delivered in *February* 1818; and in *March*, the client's son (it does not appear whether he was an attorney) balanced and settled the account with the solicitor; and it appeared that the sum of 1236*l.* was payable to the solicitor. Complaints were afterwards made by the son with respect to the amount of the bill; but those complaints do not appear to have been the result of any minute examination of the items. On the 1st of *August*, however, the parties agreed together that 36*l.* should be taken off; and the bill was finally settled at 1200*l.* That took place in *August* 1818. Then, in *May* 1819, part of the bill was paid, and bonds given for the remainder; and in *April* 1823, an application was made to tax the bill. It seems that the suit in which the costs had been incurred had terminated; and it does not appear that any new solicitor had been employed by the client. Sir *Thomas Plumer* refused the application, saying, that the client had had ample opportunity to examine the charges, and had thought

(a) *Turn. & Russ.* 407.

thought proper to settle the bill by taking off 36*l.*; and evidence being offered of improper charges, he said; "Probably, many of the items in the bills would be disallowed by the Master; but that is not enough, after such dealings, to give the party a right to have the bills taxed. Items which would be disallowed do not amount to that fraud, which must be made out, in order to subject to taxation bills that have been so settled."

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In *Crossley v. Parker* (a), Sir T. Plumer ordered a bill to be taxed which had been delivered in *August*, and paid in *November* 1818, the suit continuing all the time, and the solicitor continuing all the time to act for the client, and the client having no other professional assistance. That case contains a great variety of circumstances which do not occur here; and it cannot be an authority in the present case.

Some of the older cases have also been referred to. In *The Drapers' Company v. Davis* (b), Lord Hardwicke ordered the taxation of a bill for which a judgment had been given seventeen years before. That is always cited as a very strong case; but there, there had been no payment, but a judgment taken pending the suit, and the client had no other professional assistance, and exorbitant charges were alleged and proved. In *Aubrey v. Popkin* (c), a solicitor had obtained, first a bond, and afterwards a mortgage, by threatening to abandon the client; and had possession of his papers; no other professional person had acted for the client; and threats had been used.

Such being the state of the decisions, it remains to apply the rules so laid down to the facts of this case.
 Here

(a) 1 J. & W. 460
 (b) 2 Atk. 296.

(c) 1 Dick. 408.

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Here is a bill delivered, and subsequently paid ; the relation of solicitor and client has ceased ; another solicitor has been employed by the client. There is no evidence of pressure, no necessity for the papers stated or proved, or suggested to Messrs. *Goode* when they were applied for.

The utmost that the cases establish is, that under such circumstances, the Court will open a bill and have it taxed, upon proof of specific errors so gross as to amount to evidence of fraud ; and, if specific errors had been alleged and proved, I might not have been justified in refusing taxation, notwithstanding all that has passed. But the general allegations in this petition are, I apprehend, to be disregarded ; and the sums said to have been struck off by Mr. *Smith*, the clerk in Court, must also be disregarded, for there is no evidence from him that the charges are improper, but merely an affidavit by another person stating that Mr. *Smith* had thought so. They are not specifically charged to be improper, in the petition. The only improper charge specifically stated in the petition is, that the bill of costs contains charges for journeys, time, and attendance, in and about the trial of the action of *Doe dem. Priestley v. Calloway* at the assizes at *Northampton*, described as business and journeys which ought not to have been done or taken. The affidavit in support of the petition is in the same words, and is answered by Mr. *Goode*, who says, that the action in question arose out of a suit in equity to which *Horlock* and *Yems* were parties, and that they were both required to appear on the trial of the action, and that the journeys to *Northampton* were taken at the express instance and request of *Yems*. To that explanation I do not find any answer given. Although no order was drawn up, yet an order directing the trial was pronounced, and minutes of it were produced before me. And even
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if the petitioners had complained that Mr. Goode's personal presence at *Northampton* might have been dispensed with, and therefore ought not to have been charged for, that would have depended upon the circumstances, if objected to in proper time; but, after payment of a bill which had been examined by another solicitor, it would be going much beyond any authority, to open such a bill, because the solicitor had, at the express instance and request of the client, taken a journey to protect the client's interest at a trial upon the circuit.

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It appears to me, therefore, that I cannot sanction the sending the bill for taxation, without disturbing the rule which all the cases referred to have laid down on the subject.

Now, upon looking through the short-hand writer's note of the judgment of the Master of the Rolls, it appears that he considered this item about the journeys to *Northampton* as the only item upon which an order for taxation could be made. He seems to have observed that no order was drawn up. Whether the minutes of the order were produced before his Lordship I do not know; but undoubtedly they were produced before me. The Master of the Rolls would seem to have said that the order was not to be found, and that no explanation had been given to him in evidence by which he could at all satisfactorily account for that circumstance; and that the question really was, whether, under those circumstances, he was not, for the present purpose, to consider that the charges in respect of the alleged trial under that order were to be considered as *prima facie* errors, though by no means errors established.

Now, if this report be accurate, I confess I do not go along with the Master of the Rolls, in considering that

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a case of *primâ facie* error is a ground for referring a bill for taxation, after payment. In this case, as in a bill to open an account, *primâ facie* errors are not enough; the error must be alleged and proved. For if, because there is a *primâ facie* error, the account were to be opened, that *primâ facie* error might afterwards be explained; and the very ground upon which the order is to stand may be taken from under the party obtaining it; and yet the effect of the order remains. I apprehend that it is absolutely necessary, that, when an application for taxation is made upon the ground of errors, it should be distinctly stated in the petition, and proved, that such errors exist. Whether the whole evidence was before the Master of the Rolls, I do not know; but, to my mind, the evidence of that journey to *Northampton* was most satisfactorily explained. There was a question in the cause, in which *Horlock* and *Yems* were both interested; they both had a common interest in an annuity; and an action was directed to try the title.

It is very true that no order was drawn up; but that is not important, in my view of the case: the question is, whether what was done was done under the direction of the Court. The minutes of the order were produced, by which it appears that the Court had ordered such a trial to take place.

The affidavits do not contradict the statement that, under these circumstances, *Yems* requested Messrs. *Goode* to attend the trial; and the charges are for this attendance and the consequent expenses. This is not met by any counter-statement. I am bound, therefore, to take it, as being the only statement on oath. I have, in support of it, the minutes of the order; so that there is no balance of evidence: the evidence is all on one side.

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The cases certainly go to this, that if it is unnecessary that a solicitor should take a particular journey on behalf of his client, and the duty can be as well performed by an agent, it is the duty of the solicitor to make a representation to the client to that effect (a) : but, if the client, after receiving that explanation, wishes the solicitor to undertake the journey personally, it is very hard upon the solicitor if he is not to be remunerated for the expenses of that journey. A bill was delivered, containing these charges, and another professional person was then employed by the petitioners. It must be presumed that the petitioners investigated the items in the bill. There was ample time for that purpose; it was the duty of their solicitor to investigate them. And then, that item, and that alone, is selected as such an improper charge as, in the language of Lord *Eldon*, amounts to fraud.

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The only other ground said to have been relied on by the Master of the Rolls, as the foundation of his order, is that of sums of credit alleged to have been omitted in the bills; but, if this had been proved to be so, it would only have come to what Lord *Eldon* speaks of in *Cooke v. Setree* (b), namely, an inquiry whether sums had been received, for which the client was entitled to credit, in part satisfaction of the solicitor's bill of costs; for, in the first place, the petition does not allege any particular sum as having been received, for which credit ought to have been given, but only that Messrs. *Goode* have not produced any vouchers or accounts of the application of divers sums, while it appears by the bills that they did receive, or ought to have received,

(a) See *Alsop v. Lord Oxford*, 1 *Mylne & Keen*, 564.; and *Crossley v. Parker*, 1 *J. & W.* 460.

(b) 1 *V. & B.* 126.

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ceived, further sums, and to have given credit for the same.

Upon no principle could the petitioners be permitted to open the account upon such an allegation, which it is impossible for the solicitors to meet; but an affidavit was afterwards made, specifying the sums; and, in my opinion, it is satisfactorily proved that the sums so received were all accounted for to the client; and his receipts were produced, shewing the application of all those sums; so that the particular transactions were settled separately; and it appears, by the receipts produced, that the transaction was ultimately balanced under the hand of the client. It, therefore, does not form any part of the costs. It is a perfectly independent transaction, and settled as such; and, therefore, there was nothing in it that should have been placed as a credit against the bill of costs; being settled in a different way. I should infer, from the short-hand writer's note of the judgment of the Master of the Rolls, that he had not the same evidence of the manner in which the accounts were settled which was before me.

Now, I understand from the affidavit of *Mr. Goode*, which is totally unaffected by anything on the other side, that, *Mr. Goode* having received certain sums of money on behalf of his client *Mr. Yems*, the client wanted a sum of 200*L.* for a particular purpose; and *Mr. Goode* says, he advanced 101*L.* 1*s.*, being the amount which, together with the sums he had received on account of *Yems*, was necessary to make up the sum of 200*L.*; and that sum he had paid to his client. So that, instead of its being an item of credit in that account, it became an item of debit. If that statement be taken to be true, the client had received, not only the whole of what *Mr. Goode* had received for him, but a considerably

considerably larger sum, viz. 101*l.* 1*s.* Then, we have evidence of that account having been distinctly allowed and settled: but, if all that were a matter to require investigation, it would not, in my view of the case, justify an order for taxation of the bill; it might justify an order to inquire whether sums had been received which ought to be set against the bill. But there is no such allegation in the petition; it is a matter which came out in a subsequent affidavit, in which sums are introduced, forming no part of the case made against the solicitors by the petition.

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I observe that the Master of the Rolls at first expressed great doubt as to ordering the taxation. The matter has been more fully investigated and explained in the discussion before me; and I have the satisfaction of thinking, from the observations of the Master of the Rolls, that if he had had the same information of the transactions with which I have been furnished, he would have made the order which I feel now bound to make.

The result therefore is, that I must discharge the order for taxation, and dismiss the original petition.

Mr. *Stinton*, at the conclusion of the Lord Chancellor's judgment, said that the Master of the Rolls had precisely the same evidence before him, except that the Registrar's minute book was not then produced; but that the minutes of the order and the receipt and the cheque were produced.

The Lord Chancellor remarked, that, in all probability, the evidence was not so fully explained to the Master of the Rolls.

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Mr. *Stinton* then applied for the costs.

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I think, upon the whole, this is not a case in which I should give costs, because the subject is one upon which I believe there has been a misunderstanding in the profession (a).

(a) See the next case.

Feb. 23.

March 3.

May 24.

WATERS v. TAYLOR.

Refusal to order the taxation of a solicitor's bills of costs, the amount of which had been secured by a deed in the year 1819, although the suit was then pending; the client's affairs having, since the year 1822, (when that solicitor died) been in the hands of another solicitor, and there being no proof of such dealings between the solicitor and client, or of such errors or improper charges in the bill, as could amount to evidence of fraud.

IN and from the year 1807, *John Mills*, at first alone, and afterwards jointly with his partners *John Robinson* and *Samuel Young*, was employed as the attorney and solicitor of the Plaintiff *Edmund Waters*, in this cause, and in various other suits, both at law and in equity, in relation to the *King's Theatre* or *Italian Opera House*, of which *Waters*, as the executor of *Francis Goold*, was the joint proprietor with *William Taylor*.

By a deed of the 31st of *August* 1814, an annuity of 250*l.* per annum, supposed to be charged upon the *Opera House*, and redeemable upon payment of 5000*l.*, was assigned, together with arrears from the year 1793, to *Mills*, as a trustee for *Waters*; and by a deed of the 24th of *March* 1815, another annuity of 200*l.*, charged upon the *Opera House*, was assigned, together with arrears

arrears from the year 1793, to *Mills*, as a trustee for *Waters*; and by deeds of the 16th of *September* 1816, the 4th of *October* 1816, and the 5th of *October* 1816, all the interest of *Waters* in the *Opera House*, both as proprietor and creditor, and all annuities, debentures, mortgages, and other incumbrances to which he was entitled, were charged with, or covenanted to be assigned as securities for, the repayment of certain monies advanced by *Thomas Birch* and *Abraham Henry Chambers*.

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By a deed of the 4th of *February* 1817, made between *Waters* of the first part, *Mills* of the second part, and *Robinson* and *Young* of the third part, after reciting the deeds of the 31st of *August* 1814, and the 24th of *March* 1815, and that *Waters* was indebted to *Mills* in the sum of 1834*l.* 14*s.* for principal and interest due on a mortgage to him made by *Goold*, and that he was also indebted to *Mills* and his co-partners *Robinson* and *Young*, in the sum of 3708*l.* that day ascertained to be due to them upon an account stated, and that it had been agreed that the payment of those sums and interest should be secured out of the arrears of the two annuities of 250*l.* and 200*l.*, and also out of the sum of 5000*l.* before mentioned, *Waters* declared, that *Mills* should stand possessed of the annuities, arrears, and sums of money, upon trust that he should prosecute the claims before the Master in this cause, for establishing such debts, and for obtaining payment of all arrears thereof, and retain to himself all costs and expenses in the prosecution and obtaining payment thereof, and should also retain to himself and his partners their costs and expenses of preparing the present deed; and then should retain to himself the sum of 1834*l.* 14*s.* before mentioned, with interest at 5 per cent. from the then present date, and should pay himself and his co-part-

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ners the before-mentioned sum of £708*l.*, with interest at 5 per cent. from the same date, and should apply the surplus as *Waters* should direct.

The sum of £708*l.*, mentioned as being due to *Mills*, *Robinson*, and *Young*, upon an account stated, was made up of sundry bills of costs then and previously delivered.

Mills, *Robinson*, and *Young* continued to act as solicitors for *Waters*, and to carry on the business of the suits already mentioned.

In the month of *July* 1817, the partnership between *Mills*, *Robinson*, and *Young* was dissolved, and, thenceforward, *Mills* alone acted as solicitor for *Waters*.

On the 20th of *July* 1819, a deed was made, between *Waters* of the first part; *Thomas Birch* and *Abraham Henry Chambers* of the second part; *Joshua Mayhew* of the third part; *Mills*, in his individual capacity, of the fourth part; and *Mills*, *Robinson*, and *Young* of the fifth part. After reciting the deeds already mentioned, and also two deeds of the 25th of *August* 1817 and the 11th of *July* 1818, by which *Waters* covenanted to assign the *Opera House*, and all his interest therein, and in the funds in Court in this suit, and in all charges and incumbrances thereon, to *Birch* and *Chambers*, for securing advances made by them, and also charged the same property as an indemnity to *Mayhew*, as therein mentioned; and reciting that the before-mentioned sum of 1834*l.* 14*s.*, with two years' interest, making together 2018*l.* 3*s.* 4*d.*, and the before-mentioned sum of £708*l.*, with two years' interest, making together 4078*l.* 16*s.*, were then due on the security of the deed of the 4th of *February* 1817; and reciting that *Waters* was also indebted to *Mills*, in his individual character, in the further

sum

sum of 960*l.* 17*s.* 8*d.* for business done to the end of the year 1818, making, in the whole, the sum of 2979*l.* 1*s.*, and to *Mills, Robinson, and Young*, in respect of their late partnership, in the sum of 1008*l.* 10*s.* 1*d.*, making, in the whole, the sum of 5087*l.* 6*s.* 1*d.*; and reciting that a claim had been taken in before the Master in this cause, for the arrears of the annuity of 250*l.*, and the interest thereon up to the 24th of *August* 1814, amounting, in the whole (deducting property tax), to 7394*l.* 5*s.* 5*d.*, and another claim for the arrears of the annuity of 200*l.* up to the time when it ceased, and for the interest thereon to the 29th of *September* 1814, amounting, in the whole (deducting property tax), to 3852*l.* 14*s.*; and reciting that those claims having been allowed by the Master, *Waters* (with the concurrence of *Birch, Chambers, and Mayhew*) proposed to *Mills, Robinson, and Young*, that they should waive their respective liens under the deed of the 4th of *February* 1817 on the sums so claimed, and permit *Waters* to take the benefit thereof, in order to set off the same sums, together with certain other claims of his own, against the money agreed to be given by him for the purchase of the *Opera House*, and that, in consideration of such waiver and permission, *Waters* (with the concurrence before mentioned) should secure to *Mills*, and to *Mills, Robinson, and Young*, respectively, the payment of the aggregate sums of 2979*l.* 1*s.* and 5087*l.* 6*s.* 1*d.*, and all the interest due and to become due thereon, in manner thereafter mentioned, and also that *Waters* should further secure the same by his bonds in manner thereafter mentioned; and reciting that *Mills, Robinson, and Young* had acceded to the proposal, and having waived their respective liens on the sums so allowed by the Master, *Waters* had been permitted to take the benefit thereof, and *Mills, and Mills, Robinson, and Young*, had agreed to make the release thereafter contained in confirmation thereof; and reciting

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reciting that *Waters* had, by his bond, bearing even date with the present deed, become bound to *Mills* in the penal sum of 5958*l.*, for securing the sum of 2979*l.* 1*s.*, being the total amount of principal and interest then due to him individually, with interest at 5 per cent., payable in manner therein mentioned; and reciting a similar bond from *Waters* to *Mills*, *Robinson*, and *Young*, in the penal sum of 10,174*l.*, for securing the sum of 5087*l.* 6*s.* 1*d.*, being the total amount of principal and interest then due to them in respect of their late partnership, with interest at 5 per cent., payable in manner therein mentioned: it was witnessed, that *Mills* assigned, and *Robinson* and *Young* released, to *Waters*, the several sums of 7394*l.* 5*s.* 5*d.* and 3852*l.* 14*s.* allowed by the Master; and it was also witnessed, that *Waters* (with the approbation of *Robinson* and *Young*) assigned, and *Birch*, *Chambers*, and *Mayhew* released, to *Mills*, all the annuities and other sums of money, debentures, mortgages, and other incumbrances charged upon or affecting the *Opera House*, and to which *Waters*, and *Birch*, *Chambers*, and *Mayhew*, or any of them, as his mortgagees, was or were in any manner entitled, as in the several before-recited deeds mentioned, and all sums of money, stocks, funds, and other securities whatsoever, which, by virtue of any decree or order of the Court of Chancery, in the before-mentioned suits touching the *Opera House*, might become payable to *Waters*, out of the sums standing to the credit of the causes of *Waters* v. *Taylor* and *Taylor* v. *Waters*, as a proprietor or creditor of the *Opera House*; and the monies (if any) due and to become due since the 24th of *August* 1814 and the 29th of *September* 1814, in respect of the interest of so much of the several sums of 7394*l.* 5*s.* 5*d.* and 3852*l.* 14*s.* as consisted of principal money, and the payments due and to become due since the 24th of *August* 1814, in respect of the annuity of 250*l.*, and the eventual sum of 5000*l.* payable for the repurchase

repurchase of the annuity of 250*l.*, if any persons for the time being entitled to the *Opera House* should be desirous to redeem that annuity, together with all securities for the interest, payments, and eventual sum respectively; to hold to *Mills*, discharged from the claims of *Birch*, *Chambers*, and *Mayhew* (but only for the purpose of giving priority to the then securities in that respect), upon trust, in case *Waters* should, on the 4th of *February* then next, pay to *Mills* the sum of 2979*l.* 1*s.*, and to *Mills*, *Robinson*, and *Young* the sum of 5087*l.* 6*s.* 1*d.*, with interest at 5 per cent., in manner therein mentioned, to forbear making any disposition of the several premises thereby assigned; and, in case of payment of the several before-mentioned principal sums and interest, to reassign the same premises to *Waters*, or as he should direct, subject to the charges of *Birch*, *Chambers*, and *Mayhew*; but, in case default should be made in payment thereof, then in trust that *Mills* should, at his discretion, and without the privity of *Waters*, enforce payment of and receive the interest, payments, eventual sums, and other premises thereby assigned, and out of the produce pay himself the expenses of the execution of the trust, and retain the sum of 2979*l.* 1*s.*, and the interest thereof; and, in the next place, pay to *Mills*, *Robinson*, and *Young* the sum of 5087*l.* 6*s.* 1*d.*, and the interest thereof; and should pay the surplus to *Birch*, *Chambers*, and *Mayhew*, according to the priority of their securities, and in satisfaction thereof, and, subject thereto, to *Waters*. The deed contained a proviso that in case the interest in respect of the sums of 2979*l.* 1*s.* and 5087*l.* 6*s.* 1*d.* should be regularly paid on the 4th of *August* and the 4th of *February*, in every year, or within twenty-one days afterwards, *Mills* individually, and *Mills*, *Robinson*, and *Young* collectively, would forbear from proceeding to enforce payment of the before-mentioned several sums, before the 5th of *July* 1826, unless the

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the *Opera House* should be previously sold, by *Waters*, or under any trust or directions for sale created or given by him, or unless the monies and funds in any suit in Chancery thereby assigned, or so much as should be sufficient to discharge the principal and interest monies thereby secured, should be sooner directed to be paid out of court to the persons entitled thereto.

In the early part of the month of *January* 1822, *Mills* died, having appointed two executors, of whom *Alexander Robert Sutherland*, Doctor of Physic, was the survivor. *Mills's* representatives delivered to *Waters* further bills of costs for business done subsequently to the deed of the 20th of *July* 1819, and down to his death, and also for preparing that deed, amounting, together, to the sum of 1920*l.* 16*s.* 7*d.*, or thereabouts; and it appeared, by an account annexed to such bills, that in the year 1825, *Mills's* representatives received a considerable sum of money which they applied in liquidation of the last-mentioned costs; but that a balance still remained due from *Waters*.

After the death of *Mills*, *Waters* employed *William Leake*, and subsequently *John William Bury*, as his solicitor.

By two deeds, dated the 15th of *March* 1823, *Waters* assigned to *Henry Winchester*, for the benefit of himself (*Winchester*), and other creditors of *Waters* (amongst other things), the *Opera House* and its appurtenances, and all sums of money, stocks, funds, and other securities then or thereafter payable or transferable to or on account of *Waters*, by virtue of any decree or order of the Court of Chancery, then or thereafter to be made in any suit or suits then pending, or to be thereafter instituted, respecting the *Opera House* or its concerns ;

cerns; and also all monies due from the representatives of *Mills*, or of *Mills, Robinson, and Young*, and all property belonging to *Waters*, then in the tenure of, or claimed to be held by, *Chambers* or *Mills*, or *Mills, Robinson, and Young*, by way of mortgage, security, or otherwise.

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On the 10th of *March* 1832, *Dr. Sutherland* received from *Leake*, as the solicitor of *Waters*, the sum of 3971*l.* 5*s.* 3*d.*, in part discharge of *Mills's* claims upon *Waters*.

By an order of the 30th of *April* 1836, it was ordered, that the sum of 55,111*l.* 6*s.* 10*d.* Bank 3 per cent. annuities, standing in the name of the Accountant-General, in trust in this cause, to the account of *Waters*, and 798*l.* 8*s.* 5*d.* cash in the Bank, to the credit of the cause, to the like account, or any interest thereafter to accrue due upon the Bank annuities, should not be transferred or otherwise disposed of, without notice to *Dr. Sutherland*.

Dr. Sutherland, in the month of *July* 1836, presented a petition, praying for payment, out of the fund in Court, of the amount still due to him, as *Mills's* representative, under the deed of 1819.

On the 2d of *November* 1836, before *Dr. Sutherland's* petition had been heard, a petition was presented by *Henry Winchester*, alleging that the several bills of costs, the amount of which was secured by the before-mentioned deeds, were never investigated or settled by any person on behalf of *Waters*, previously to or at the times at which those deeds were executed; and that the sum of 5500*l.* only had been allowed by the Master in respect of the annuity of 250*l.*, and the sum of 2600*l.* only,
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in respect of the annuity of 200*l.*; and that, at the time at which the deed of 1819 was executed, it had been referred back to the Master to review his report, with respect to the sum of 5500*l.*; and that several years after the date of that deed *Waters* was compelled to pay the sum of 5500*l.* into Court, in part payment of his purchase-money, although a previous order, made before the date of the deed, had permitted him to retain that sum, as well as the sum of 2600*l.* out of his purchase-money.

The petition also stated, that it was alleged, that after the date of the deed of 1819, *Robinson* and *Young* transferred their interest in the 5087*l.* 6*s.* 1*d.* to *Mills*; and it went on to state, that the sum of money received by *Mills's* representatives in the year 1825 was received and applied without the knowledge or concurrence of *Waters*, and that the same arose from the sale of certain stock which had been invested in the names of *Mills* and one *Pearce*, and which had reference in some manner to the mortgage security to *Mills*, mentioned in the deed of 1819; and that *Mills's* bills of costs in *Taylor v. Waters* amounted to 747*l.* 4*s.* 4*d.*, or thereabouts, which sum was included in the security of 1819; that the bill in that suit was afterwards dismissed, in the year 1821, as against *Waters*, and his costs ordered to be taxed; and that those costs were taxed at the sum of 229*l.* 19*s.* 4*d.*; and that, by an order, made in this cause, on the 22d of *May* 1830, it was referred to the Master to tax all parties their costs of the suit, up to that time, as between solicitor and client; and that it was ordered that so much of the 3 per cent. annuities then standing to the credit of the cause as would raise the amount of the costs, when taxed, should be sold, and that out of the money produced by such sale the costs should be paid to the solicitors of the parties; that

that the then solicitor for *Waters* collected together the several bills of costs relating to the proceedings in this cause, made out by *Mills*, and *Mills, Robinson*, and *Young*, and had copies made, which, after being sent to Messrs. *Young and Co. (a)*, who were the solicitors for *Mills's* representatives, and also his successors in business, for their approval, were carried into the Master's office, as part of the Plaintiff's costs in the cause; and that those costs, amounting together to 5855*l.*9*s.*10*d.*, were taxed, amicably, as between solicitor and client; and that, in order to vouch for several charges and disbursements contained in the bills of costs so made out by *Mills*, and *Mills, Robinson*, and *Young*, in the absence of papers and documents which had been lost or mislaid, or could not be produced, it was arranged, by agreement between the parties, that *Young and Co.* should attend with the cash and other books kept by *Mills*, containing entries of business done and disbursements made by him relating to the proceedings in the cause, to vouch the several charges; and that, after several months occupied in the taxation of such costs, the sum of 1884*l.*4*s.*7*d.* was deducted from them, by which means they were reduced to the sum of 3971*l.*5*s.*3*d.*, instead of 5855*l.*9*s.*10*d.*, at which they were delivered to *Waters*, and that, upon the last mentioned sum, interest was claimed by *Mills's* executors, from the date of the deed of 1819.

The petition further stated, that in consequence of doubts having arisen as to the validity of the deed of 1819, and in consequence also of the assignment for the benefit of creditors made by *Waters* to the petitioner, it was arranged, under the advice of counsel, that any payment

(a) This firm consisted of *Samuel Young*, before-mentioned, *William Samuel Young* (his son), and *Thomas Elliott*.

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payment to the executors of *Mills* should be made without prejudice both to the validity of the deed of 1819, and to the security purported to be created thereby, and to the amount of their claims; and that, accordingly, when Dr. *Sutherland* received the sum of 3971*l.* 5*s.* 3*d.* before mentioned, he gave a receipt in the following form: —

London, 10th March, 1832.

“I acknowledge to have received this day, from *William Leake*, Esq., solicitor of *Edmund Waters*, Esq., late of the *King’s Theatre* in the *Haymarket*, the sum of 3971*l.* 5*s.* 3*d.*, on account and in part payment of the sum claimed to be due to the estate of the late *John Mills* of *Parliament Street*, deceased, from the said *Edmund Waters*, in respect of business done by him as the solicitor for the said *Edmund Waters*, and on a balance or settlement of cash and other accounts between them; and the said sum of 3971*l.* 5*s.* 3*d.* is so received by me, without prejudice to the validity or invalidity of the security or mortgage executed by the said *Edmund Waters* to the said *John Mills* and his then partners, dated the 20th day of *July* 1819, and likewise without prejudice to the question as to what sum is due from the said *Edmund Waters* to the said *John Mills*, upon the investigation of the several bills of costs debited by him to the said *Edmund Waters*, and the settlement of the cash and other accounts between them.

“*A. R. Sutherland*,

Executor of the late *John Mills*, Esq.

“Witness, *John William Bury*.”

The petition alleged, that in the account referred to in the deed of 1819 *Waters* was charged with sums amounting together to about 445*l.* 11*s.* 10*d.*, in respect of the costs of *John Palmer* and *William Morland*, two
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of the Defendants in *Waters v. Taylor*, for whom *Mills*, in order to save expense, appeared, and put in answers; and that, although *Palmer* in his answer stated that he had never consented to become a trustee, and declined to act, yet *Mills*, in his before-mentioned bill of costs, made charges amounting to 94*l.* 4*s.* 2*d.*, for his attending, on *Palmer's* behalf, all the proceedings in the Master's office under the decree. The petition further alleged, that *Waters's* bills of costs in this suit contained various charges for sequestrator's fees, which it appeared, upon the taxation of those costs, had never been paid, and also various other irregular charges, which, upon the taxation, were disallowed as such; and that *Mills's* executors had never rendered any correct account of their claim; but that on or about the 18th of *July* 1835, *Samuel Young*, as the solicitor for *Dr. Sutherland*, sent to the petitioner's solicitor an account, in which there were several inaccuracies, particularly a statement that 3724*l.* 11*s.* 2*d.* had been paid to *Dr. Sutherland*, instead of 3971*l.* 5*s.* 3*d.*; and that *Young*, having admitted some of the objections taken to the account to be well-founded, afterwards furnished an account, in which he made the sum of 9245*l.* 1*s.* 11*d.*, to be due to *Mills's* executors; and that, as the petitioner was still dissatisfied, his own solicitor afterwards made out, and sent to *Young*, an account, as between *Mills* and *Waters*, making rests at the times at which various sums were paid to *Mills* or his representatives, and also claiming credit for various sums, and other deductions, to which, in the opinion of the petitioner's solicitor, *Waters* was, under the circumstances, fairly entitled to credit; and by that account it appeared, that the sum of 4597*l.* 8*s.* 7*d.*, or thereabouts, was due to *Mills's* estate. In this account, credit was taken, on the part of *Waters*, for the deductions made from that portion of the costs relating to the proceedings in this cause, which had already been taxed and settled under the orders in this cause; and the amount of which costs,

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as taxed, were paid to the surviving executor on the 10th of *March* 1892.

The petition stated, that *Young* had since made out another account, in which he claimed the sum of 8891*l.* 4*s.* 10*d.* as being due to *Mills's* estate; and that *Mills's* executor also claimed to have paid to him, out of the funds in Court belonging to *Waters*, various costs and expenses in consequence of the trust created by the deed of 1819.

The petition added, that the petitioner was advised that it was his duty to take measures for the purpose of investigating the accounts, and of having it ascertained what was due to *Mills* or his estate; and that the petitioner was willing that the deed of 1819 should stand as a security for the payment of whatever sum, upon a full and fair investigation of the accounts, might be found due to *Mills* or his estate.

The petition prayed a reference to the Master, to tax the bills of costs of *Mills*, and *Mills, Robinson*, and *Young*, as between solicitor and client, and also to investigate the cash and other accounts between *Waters* and *Mills*, and *Mills, Robinson*, and *Young*; and that what the Master should find to have been the balance due from *Waters* on the 20th of *July* 1819, might be taken as the sum secured by the deed of that date, and that the Master might calculate interest on that sum from the date of that deed, and also proceed to take the subsequent cash and other accounts between *Waters* and *Mills*; and that what the Master should find to be the balance due from *Waters*, might be set apart to a separate account, out of the sum of 55,111*l.* 6*s.* 10*d.*, Bank annuities, already mentioned, standing to the credit of this cause, to the account of *Edmund Waters*.

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The allegations of this petition, so far as related to the accounts and bills of costs delivered by *Young* after *Mills's* death, and to the taxation of costs, and the form of the receipt given by *Dr. Sutherland*, and the reason given for the adoption of that form, were verified by the affidavit of *Mr. Bury*, *Mr. Waters's* present solicitor, who also stated his belief that the bills of costs, the amounts of which were provided for by the deeds before mentioned, were never investigated or settled by any person on behalf of *Waters*, either at or before the time at which the deeds were executed.

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An affidavit sworn by *Mr. Young*, in opposition to *Mr. Winchester's* petition, stated, that between the year 1808, when he entered into partnership with *Mills* and *Robinson*, and the month of *July* 1817, when that partnership was dissolved, four classes of bills were delivered to *Waters* by the firm; that the first of these classes amounted to the sum of 2984*l.* 0*s.* 1*d.*, commencing with business done before the deponent entered into the partnership, and ending at the long vacation of the year 1811, and was soon after that period delivered to the Plaintiff; that the second class amounted to 2628*l.* 15*s.* 9*d.* for business done up to the long vacation of 1814, making together 5612*l.* 15*s.* 10*d.*, and that, during those periods, the firm had received, on account of *Waters*, sums amounting to 3817*l.* 9*s.* 9*d.*, leaving a balance of 1795*l.* 6*s.* 1*d.* due, which was sometime afterwards settled, by *Waters* giving, as the deponent believed, an acceptance or promissory note for 1795*l.*, due on the 30th of *November* 1815, but which was not paid, except as after mentioned; and that the third class of bills, for further business done up to *Hilary* term 1816, amounted to 2043*l.* 9*s.* 6*d.*, and was at or about that period delivered to *Waters*, and remained unsettled until the 4th of *February* 1817, when it ap-
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peared the firm had received sums amounting to 236*l.* 0*s.* 6*d.*, leaving a balance of 1807*l.* 9*s.* 0*d.*, which, together with the sum of 1795*l.* before mentioned, and interest thereon, made 3708*l.*, which was secured by the deed of 1817; and that the fourth class of bills amounted to 1008*l.* 10*s.* 1*d.*, commencing at *Hilary* term 1816, and ending at the dissolution of the partnership, and was delivered to *Waters* in consequence of the dissolution, and remained unsettled until the 4th of *February* 1819, when the sum of 3708*l.*, with two years' interest, was payable under the deed of 1817.

The deponent stated, that, eighteen months after the dissolution of the partnership of *Mills, Robinson, and Young*, the deponent and his partner *Robinson* were desirous that at least the debt due to the firm of *Mills, Robinson, and Young*, which then amounted, with interest, to 5087*l.* 6*s.* 1*d.*, should be discharged; and many applications were accordingly made to *Waters* for the purpose, when, at length, *Waters* stated his inability to pay the amount at that time; but proposed, on the former security being relinquished, to give the most satisfactory security he could, and desired *Mills* would furnish him with his bills of costs incurred since the partnership had ended, which he would add to his debt, and extend the security to all then due; and that this negotiation was communicated to *Mayhew*, who was at that time also acting as the Plaintiff's solicitor in transactions with *Birch* and *Chambers*; and that the form of the security to be given by *Waters* was at length arranged between *Mayhew*, the solicitor of *Birch* and *Chambers*, and *Mills, Robinson, and Young*, and the draft of the intended security was drawn, with blanks for the amounts of the debts and the times of payment, and was settled by one counsel on the part of *Mills, Robinson, and Young*, and by another counsel on the part of *Birch* and

and *Chambers*, *Mayhew* and *Waters*; *Mayhew* being privy to every part of the transaction, and consulted by *Waters* on every occasion relative thereto; that a meeting then took place, for the purpose of inserting in the draft the amounts of the debts and the times of payment, which was attended by *Waters*, by *Mills*, *Robinson*, and *Young*, and by *Mayhew*; when, upon conferring as to the time of payment, *Waters* said he feared he must ask several years, but that the interest should be regularly paid; upon which the deponent and *Robinson* suggested that some part of the debt should be paid at a short period, as they wanted the money, in consequence of their great expenditure in fees, &c.; and that, after much conversation on the subject, and for the accommodation of *Waters*, *Mills* stated he would supply money, and undertook that, when required by the deponent or *Robinson*, he would advance to the extent of their shares; and that thereupon, and upon the guarantee of *Chambers* for the regular payment of the interest, the time proposed by *Waters* was agreed to; and that *Mills*'s undertaking was fulfilled by him a short time afterwards, and that he thereupon became entitled to the shares of *Robinson* and *Young*; and that *Chambers*, in pursuance of his guarantee, regularly paid the interest, up to the 4th February 1825; and ceased the payment of it from that time, only on account of his bankruptcy, which happened a few months afterwards. The deponent added, that at the same meeting, *Mills* inquired of *Waters* whether he had looked through the bills which he had last delivered, as desired by *Waters*, and which *Waters* then held in his hand; and that *Waters* replied, that he expected they would have far exceeded the sum to which they amounted, and which *Waters* stated was 960*l.* 17*s.* 8*d.*, and that he should look no further into them, being perfectly satisfied, or words to that effect.

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The deponent went on to state, that at the time of *Mills's* death he, the deponent, was desired to attend immediately to the conduct of this suit, on behalf of *Waters*; and that he accordingly applied to *Dr. Sutherland*, as *Mills's* acting executor, for permission to select from his papers such as were necessary for the purpose of conducting it; and that, having obtained all the papers which he thought necessary, relating to this suit, he did what was pressing in the suit, until the month of *April* following, when *Mr. Leake*, the predecessor of *Mr. Bury*, as solicitor for *Waters*, called on the deponent for various papers in the suit, for the purpose of prosecuting it on behalf of *Waters*, as he stated he had authority from *Waters* so to do; and that the deponent accordingly handed to *Leake* such papers as he required, and permitted *Mr. Bury* (who was then *Mr. Leake's* clerk) to take such others as were necessary; and so, from time to time, since *Mr. Bury* became *Waters's* solicitor, permitted his clerk to have whatever he required, up to the present time; and that when the clerk came to the deponent's office, he was always shewn into the room where the papers in this cause were, and left to search for and take away whatever he wanted.

The deponent stated also, that according to the practice of the firm of *Mills, Robinson, and Young*, when papers in any cause or business were done with, and the bills made out, they were sometimes tied up in bundles, and put away in a closet; but, to prevent the great accumulation of papers, many were burned or destroyed; and that all papers not considered as done with, as well as those so put away and belonging to any matters in which *Waters* was a party, remained, on the dissolution of the partnership, in the possession of *Mills*, and were wholly out of the possession or control of the deponent, from that time, until his application to

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Dr. *Sutherland*, before mentioned; and that, on that occasion, he found that many of the papers which had been so put away were in a bad state, the writing having been obliterated, and the paper crumbling to dust, under the effects of damp; and that they were, therefore, burned or destroyed, the deponent first endeavouring to find out whether any of them could for any cause be necessary or useful if preserved; and that nearly all the papers and documents relative to the business done for *Waters*, other than the business of this suit, had been lost or destroyed; and that, of the papers relating to this suit, very many vouchers and material papers or documents were lost, mislaid, or destroyed; but that the papers which the deponent destroyed after *Mills's* death, as before mentioned, would have been kept by him, even in their decayed state, if he had not considered that the bills to which they related, and all matters relative thereto were wholly settled and at rest. He added, that the gross amount of the bills delivered to *Waters*, by *Mills*, and *Mills*, *Robinson*, and *Young*, before the date of the deed of 1819, was nearly 10,000*l.*, of which 4500*l.* only related to this suit, and that the vouchers, documents, and papers remaining in the deponent's possession applied only to a portion of the proceedings in this suit.

The deponent positively swore that it would now be utterly out of his power to support the bills of costs, in the manner usually required on taxation; particularly, as a period of twenty-eight years since the commencement, and of nineteen years since the conclusion of them, had elapsed, and as most of the charges made in such bills were for common law and equity business, in neither of which branches did the deponent interfere, but which were personally conducted by *Mills* and *Robinson*, who had both been dead many years; and he stated, that it

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was true that a bill of costs in this suit, which had been partly made out by Mr. *Bury* from the several classes of bills before mentioned, was sent by him to the deponent, for approval; but, as the deponent had known or understood very little of the proceedings, he declined approving it, or interfering with it; and he went on to say, that he could not, from any papers or documents in his possession, judge whether that bill of costs amounted to 5855*l.* 9*s.* 10*d.*, and was taxed amicably between solicitor and client; but that he believed it included the whole of *Waters's* costs, from the commencement of this suit, and, consequently, *Mills's* costs, from the date of the mortgage security up to his death, as well as the deponent's costs since *Mills's* death, and which, together, were of considerable amount; that he believed that many of the charges were taxed off, for want of vouchers, and because the papers and documents had been by some means destroyed, lost, or mislaid, and he said that he did not refuse to permit the parties taxing the bill seeing any books, papers, or documents in his possession; but on the contrary, at the particular request of Mr. *Leake*, he caused them to be taken to the Six Clerks' Office, on each occasion when the parties to the taxation attended, and produced them whenever required; but otherwise he did not interfere in, and specially protested against interfering in the taxation, and he did not know or believe that any such sum as 1884*l.* 4*s.* 7*d.* was taken off the several bills which had been delivered and settled by the deed of 1819.

The deponent further stated, that the words of the receipt signed by Dr. *Sutherland* applied, and were expressly intended to apply, to the investigation of the costs and accounts of *Mills* individually, subsequent to the mortgage security; and that the proviso that the receipt should be without prejudice to the validity or invalidity of the

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the mortgage security, applied, and was intended to apply, solely to a belief, expressed by Mr. *Bury*, that the deed of security was altogether an invalid one, and not to any question as to the amount for which the security should stand.

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An affidavit, sworn by Mr. *Bury*, in answer to that of Mr. *Young*, stated that he believed that *Mayhew* did not, on the occasion of the execution of the deed of 1819, act as solicitor of *Waters*, but that he then acted as solicitor of *Birch* and *Chambers*; and also as representing an interest which he himself then had in the *Opera House* by way of security; and that *Mills* had charged for making a copy of the draft for the perusal of *Mayhew* and Co., on the part of *Birch* and *Chambers*, and for attending *Mayhew* and Co. with it. He stated that, previously to the bills of costs being carried into the Master's office for taxation in this cause, he sent them to *Young* and Co. for their perusal; and that *Young* and Co., in a bill of costs subsequently made out, had charged the following item: — “For our trouble in perusing draft bill of costs, going through the same, pointing out the different parts which did not relate to *Waters v. Taylor*, making various observations thereon, and which took up several days, 5l.”

He added, that on the 12th of *January* 1831, Mr. *Leake* sent to Messrs. *Young* and Co. a letter, which was in part as follows: — “I enclose you copies of warrants for the whole of *Wednesday*, which I will thank you to attend on behalf of Mr. *Mills*, whose costs will then be taxed;” and that *Young* and Co.'s bill of costs contained the following item: — “Production of variety of warrants and other documents, being required to substantiate queried items; examining and arranging and assorting the papers, &c.; to produce, engaged two days; and attending Dr. *Sutherland*,

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Sutherland, the executor of the late Mr. *Mills*, for books, &c., to produce to vouch items in the bill of costs, 2*l.* 2*s.*''; and also various items of charges, amounting to 23*l.* 13*s.* 4*d.* or thereabouts, for attending upon the taxation.

An affidavit by Dr. *Sutherland* bore testimony to the accuracy of the statement made by Mr. *Young*, so far as regarded events which had happened since *Mills's* death.

The affidavit of *Thomas Elliott* also supported Mr. *Young's* affidavit generally; and further stated, that in the year 1830 or 1831, the deponent, and *Samuel Young*, and his son *William Samuel Young*, with whom the deponent was then in partnership, as attorneys and solicitors, were applied to by *Leake*, the then solicitor of *Waters*, to produce the papers and other documents in the possession of the deponent and his before-mentioned partners, for the purpose of supporting *Waters's* bill of costs in this cause, then about to be taxed; and that, on perusing that bill, for the purpose of selecting the necessary papers, the deponent discovered that it was framed very differently from the bills which had been delivered by *Mills*, *Robinson*, and *Young*, and found many charges which were not costs in the cause, and which the deponent believed he pointed out to Mr. *Bury*, then Mr. *Leake's* clerk; that, in consequence of the deponent having promised to do what he could to assist Mr. *Waters* on the taxation, Mr. *Leake* subsequently sent to *Young* and Co. the letter of the 12th of *January* 1831, mentioned in Mr. *Bury's* affidavit; but, in consequence of the letter stating that the deponent's attendance was to be on behalf of *Mills*, the deponent and his partners refused such interference; whereupon the matter stood over, until an understanding took place between

between the deponent and his partners and Mr. *Leake*, that the charges for such trouble and attendance should be made to Mr. *Waters*; and then the deponent, from time to time, attended the taxation accordingly, with the view of assisting Mr. *Leake*, by producing such books and documents as were in the possession of the deponent and his partners, and with that view only; but, the business charged for in the bill of costs having been conducted by *Mills* and *Robinson* (both of whom were then dead), the deponent was able to afford but very little explanation, as many of the papers and vouchers, as the deponent believed, from unforeseen circumstances, had been lost, mislaid, or destroyed; and many items were in consequence struck out or disallowed, which, the deponent in his conscience believed, would not have been disallowed, had *Mills* or *Robinson* been living: and the deponent believed that, for the reasons before stated, it would now be utterly impossible to tax the bill, so as to do justice to *Mills's* executor.

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On the 21st of *November* 1836, the Vice-Chancellor made an order upon the two petitions, directing that it should be referred to the Master to tax the bills of costs of *Mills*, and *Mills, Robinson*, and *Young*, delivered previously to the 20th of *July* 1819, and to take an account of the monies received by *Mills*, and *Mills, Robinson*, and *Young*, on account of *Waters*, up to that day; and that what upon that taxation, and upon taking those accounts, should be found to be the sum due from *Waters* to *Mills*, and *Mills, Robinson*, and *Young*, on that day, should be taken as the sum secured by the deed of that date; and that the Master should compute interest upon such last-mentioned sum, from the date of the deed, at the rate of 5 per cent. per annum; and that it should also be referred to the Master to tax *Mills's* bills
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of costs, incurred subsequently to the date of the deed. And, amongst other directions, it was ordered, that in case it should appear to the Master that any of the papers and documents required for such taxation, and for vouching the accounts, had been lost or mislaid, or could not be produced, the books of *Mills*, or of *Mills, Robinson, and Young*, should be received in evidence; and liberty was given to state special circumstances, with regard to any papers, vouchers, or documents, which had been lost or mislaid; and the Court reserved the consideration of what, if any, directions should be given, in the event of any papers or documents appearing to have been lost or mislaid.

Dr. Sutherland appealed from this order.

Mr. Knight and *Mr. Richards*, in support of the appeal, contended that *Mr. Winchester*, as an assignee, had no right to present a petition for taxation of the bills of costs incurred by *Waters*. They argued, that the right to taxation is given to the client alone, and is founded upon his undertaking to pay; and that there is no privity or reciprocity between the solicitor and an assignee of the client; and that the solicitor ought not to be obliged to accept the undertaking of an assignee, which may be almost, or even quite, valueless, while that of the client, in whose responsibility the solicitor confided, may be a perfectly adequate security. They said that the assignment to *Winchester* was expressed to be subject to the payment of the sums secured by the deed of 1819; and that, therefore, he had no right to dispute the security made by that deed, or to endeavour to cut down the amount of the charge to which the interest assigned to him was, at the time, expressly declared to be subject. Upon this branch of their argument, they

they cited *Hazard v. Lane* (a), *Langford v. Nott* (b), and *Storie v. Lord Bective*. (c)

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They further insisted, that even supposing *Winchester's* petition had been presented by *Waters* himself, no case for a taxation had been made. It did not appear that *Waters* had ever made even the slightest objection to any one of the items, and there was no evidence that he concurred in the present application, or that he did not disapprove of it. They remarked upon the long acquiescence of *Waters*, and those claiming under him; namely, for twenty-eight years since the commencement of the business for which the deed of 1819 provided payment, and for eighteen years since the conclusion of that business. They said, that no attempt had been made to prove that fraud or imposition had been practised by *Mills* or his partners, and that the injustice of ordering a taxation now would be very great, inasmuch as the loss and destruction of documents, and several deaths, made it impossible for the Court to place the parties in the situation in which they stood in the year 1819; and they called attention to the circumstance, that *Mills's* representatives were no parties to the taxation of the costs in this cause, which took place many years after his death. They cited, on this part of the case, the following authorities; *Pistor v. Dunbar* (d), *Langstaffe v. Taylor* (e), *Cooke v. Setree* (g), *Plenderleath v. Fraser* (h), *Crossley v. Parker* (i), *Gretton v. Leyburne* (k), *Howell v. Edmunds* (l), *Ex parte Shipdem*. (m)

Mr.

- (a) 3 Mer. 285.
(b) 1 J. & W. 291.; but see *Vincent v. Venner*, 1 Mylne & Keen, 212.
(c) 1 J. & W. 292. n.
(d) 1 Austr. 186.
(e) 14 Ves. 262.

- (g) 1 V. & B. 126.
(h) 3 V. & B. 174.
(i) 1 J. & W. 460.
(k) Turn. & Russ. 407.
(l) 4 Russ. 67.
(m) 6 Dougl. & Ryk. 339.

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Mr. *Wigram*, in support of the Vice-Chancellor's order, said that the only question was, whether *Waters* would himself be entitled to have the bills in question taxed. He contended that it was not necessary to prove that fraud or imposition had been practised by the solicitor; but that the Court, supposing all the information with respect to the bills to be on the side of the solicitor, would order a taxation, where the charges could be shewn to be, *prima facie*, so large, as to make it morally certain that, upon taxation, a great part would be struck off. This was a case like *Crossley v. Parker*; for, not only had all the costs been incurred during the pendency of this suit, but the suit was still pending when the deed of 1819 was executed. The pendency of a suit at the time of the alleged payment or settlement, was of itself a sufficient reason to justify a taxation; *Howell v. Edmunds*.(a) In *The Drapers' Company v. Davis* (b), Lord *Hardwicke* ordered a taxation, after the lapse of seventeen years; and, in another case (mentioned by Lord *Eldon* in *Cooke v. Setree* (c)), after twenty-one years. The circumstances stated in the evidence in this case entitled the Court to assume that pressure on the part of the solicitors did in fact exist. Mr. *Wigram* commented upon the cases cited on the other side, and argued that they were different from the present; and he referred to *Williams v. Piggott*.(d)

Sir *W. Horne* appeared for Mr. *Waters*, but did not interfere in the discussion.

Mr. *Knight*, in reply.

The

(a) 4 *Russ.* 67.

(b) 3 *Atk.* 293.

(c) 1 *V. & B.* 126.

(d) *Jacob*, 598.

The LORD CHANCELLOR.

Having, very recently, in the case of *Horlock v. Smith*(a), had occasion to state my view of the cases relating to taxing bills of solicitors, which had been settled and paid, it will only be necessary in this case for me to state the facts as they appear in evidence, and to apply the doctrine to be deduced from those cases to such facts.

That part of the Vice-Chancellor's order which has given rise to the discussion in this case directs the taxation of all bills of costs of the late Mr. *Mills*, and of his firm of *Mills, Robinson, and Young*, delivered before the 20th of *July* 1819, in respect of business done for Mr. *Waters*, and of the receipts on his account, and declares that the sum so found due shall be treated as the sum secured by the deed of the 20th of *July* 1819.

There is but little dispute as to the facts. It appears that in 1814 and 1815, Mr. *Mills* became assignee, in trust for *Waters*, of two annuities, supposed to be charges upon the *Opera House*; and it appears, from a recital in the deed of 1817, that *Waters* was, before that time, indebted to *Mills* in a certain sum due on a mortgage made by Mr. *Goold*, to whom *Waters* was executor; but, whatever may have been the nature of that security, by the deed of 4th of *February* 1817, that sum, recited to be so secured, and another sum stated to have been that day ascertained to be due to *Mills* and Co. upon an account stated, are charged upon the two annuities, and the arrears due. The deed of the 20th of *July* 1819, recites that there was then due to *Mills* upon that security 2018*l.*, and to *Mills* and Co. 4078*l.*, and that it was desirable, to enable *Waters* to settle his purchase

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(a) Reported, p. 495. *ant*2.

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chase money, that their lien upon the annuities should be released: they accordingly released such charge; and *Waters*, with the concurrence of *Chambers* and *Mayhew*, who appear to have had themselves a charge upon the property, assigns all his interest in the Theatre, and in the monies arising therefrom, to secure the debt so secured by the deed of 1817, and subsequent additions to it, making, together, due to *Mills* 2979*l.*, and to *Mills* and Co. 5087*l.*

In 1822, *Mr. Mills* died, and *Dr. Sutherland* is his representative. From that time, *Mr. Leake* acted as solicitor for *Waters*.

From *Mr. Young's* affidavit it appears, that in 1811, the first bill of costs was delivered; that in 1815, *Waters* gave a bill of exchange for the balance due at that time; that in 1816, other bills were delivered, and the amount secured by the deed of 1817: that upon the dissolution of partnership between *Mr. Mills* and Messrs. *Young* and *Robinson*, the latter were desirous of having *Waters's* debt paid; that a meeting took place, at which *Mr. Waters* and *Mr. Mayhew* were present: that *Waters* stated his inability to pay at that time; and that, thereupon, *Mills* undertook to satisfy his partners their shares, and take the debt to himself, which he afterwards did, and so became solely entitled to receive what is due: that the sums were then filled in, *Mr. Mills* asking *Waters* if he had looked through the bills, and *Waters* answering that they came to much less than he expected, and that he would not examine them further. I mention the fact that *Mr. Mayhew* was present, not because I find any proof of his acting for *Waters*, but because if there had been any inaccuracy in *Mr. Young's* statement of what took place, *Mr. Mayhew* might have been called upon to explain it.

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Founded upon these securities, and there being a large sum in Court subject to this charge, Dr. *Sutherland*, as representative of Mr. *Mills*, in *July* last, presented a petition for payment of what was due to his estate; but that petition having been adjourned to *November*, Mr. *Winchester*, as assignee of Mr. *Waters*, presented a cross petition, praying, in substance, what the order has directed. In support of this application to have the bills taxed, prior to the security of 1817 and 1819, this petition alleged, that the bills had not been investigated by any person on behalf of *Waters*; that 747*l.* 4*s.* 4*d.*, part of the sum secured by the deed of 1819, was for *Waters's* costs in *Taylor v. Waters*; that that suit was dismissed with costs in 1821, and that his taxed costs amounted only to 229*l.* 19*s.* 4*d.*; that, in 1830, the costs of all parties in *Waters v. Taylor* were ordered to be taxed and paid, and that *Waters's* costs, comprised in the bills secured by the deed of 1819, were claimed at 5855*l.* 9*s.* 10*d.*, but were reduced to 3971*l.* 5*s.* 3*d.* — 1884*l.* 4*s.* 7*d.* having been taken off; and the petition infers, though it does not in terms state, that this taxation was attended by Messrs. *Young and Co.* as solicitors for the representative of Mr. *Mills*; and Mr. *Bury's* affidavit is calculated to lead to the same conclusion: but Mr. *Elliott* positively denies that the attendance was on behalf of Mr. *Mills's* estate; and states, that it was given at the request of Mr. *Leake*, for the protection of Mr. *Waters's* estate: and the charges for such attendance, mentioned in Mr. *Bury's* affidavit, leave no doubt in my mind that such was the fact. These taxations, therefore, of *Taylor v. Waters* in 1821, and of *Waters v. Taylor* in 1830, were not between Mr. *Mills's* estate and the clients, but between the parties in the causes, and cannot, therefore, be used as evidence against Mr. *Mills's* representatives; besides which, it does not appear what portion of the costs claimed and

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taxed off in *Taylor v. Waters*, related to the period between the years 1819 and 1821; and Mr. *Young* states, that of 10,000*l.* of costs, only 4500*l.* related to this suit; and Mr. *Elliott* states that many of the items struck out upon taxation, were so struck out, only because they did not belong to the suit, the costs of which were then in question, and I do not find that denied in any subsequent affidavit.

Now, if the results of these taxations do not establish the right to have the bills before the year 1819 taxed, I look in vain for any other ground; because, though some other objections are made to the bills, in the petition, I do not find any of them supported by evidence. The petition alleges, that Mr. *Mills* appeared for Mr. *Palmer*, a defendant in *Waters v. Taylor*, and that he has charged attendance for him against Mr. *Waters*, although Mr. *Palmer*, by his answer, declined acting as trustee. It is not disputed that *Waters* was properly charged with Mr. *Palmer's* costs, but it is intended to be inferred that the costs subsequent to the answer might have been spared. I find nothing in any affidavit to prove this to have been so; and if there had been any such evidence, it would amount only to this, — that the cause in this respect might have been more economically conducted, — a position which, if established, would not avail for the present purpose. The only other allegation of error in the petition is, that the bills contained various charges for sequestration fees, which appeared, upon taxation, not to have been paid: but what those charges were, or in what bills they are to be found, is not stated; and I find no evidence to support the charge. It may, indeed, well be supposed, that after so many years, and with the admitted fact of the loss and destruction of papers, and the unrestricted access to all other papers afforded to the solicitors of Mr. *Waters*, and the delivery
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to them of all they required, the evidence of many payments cannot now be produced by the representative of *Mr. Mills*; which affords the strongest possible reason against a taxation at this time.

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The result of all this evidence comes to this:—that the business to which the bills apply commenced twenty-eight years ago, and was concluded eighteen years ago; that some of the bills were delivered so early as 1811, twenty-six years ago; that, in 1817, the amount then claimed to be due was secured upon certain property: that in 1819, for the convenience of the client, the solicitor gave up this security, and, with the concurrence of prior incumbrancers, took a new charge upon other property; that, upon that occasion, the sum being ascertained, the solicitor, *Mr. Mills*, with the knowledge of the client, *Mr. Waters*, and for his accommodation, bought and paid for his partners' shares of the debt; that from 1822, now fifteen years ago, *Mr. Waters's* affairs have been under the care of another solicitor; but that no attempt was ever made to open the account so closed in 1819, until last *November*, and that the attempt then made was not supported by that which alone could give it any title to success, namely, allegations and proof of such dealing between the solicitor and client, or of such errors and improper charges in the bills, as could amount to evidence of fraud. It is made to rest entirely upon the alleged reduction of the bills, upon a taxation to which neither the solicitor nor his representative was a party, and under the circumstances upon which I have before observed. The client has not only permitted eighteen years to elapse since the date of the security, without objection, but has had the use and possession of all the papers he required; and he has had the benefit of the long forbearance of his creditors,

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to obtain which, Mr. *Mills*, with his privity, purchased the shares of his partners in this debt.

It would require a very strong case indeed, to induce me to open the account, if there had been nothing else in answer to this attempt; but not only are there these strong grounds of resistance to the application for a taxation, but there is an absence of all that is required to support it.

The case indeed differs from that of *Horlock v. Smith* (a), in this,—that the security was taken whilst the suits were depending: and whilst the relation of solicitor and client continued, but so it was in *Cooke v. Setree* (b); and in *Plenderleath v. Fraser* (c), and *Gretton v. Leyburna* (d), the relation of attorney and client continued at the time of the settlement. No doubt, the settlement or payment of a solicitor's bills, pending a suit, and whilst the relation continues, affords grounds upon which the account will be much more easily opened, and the bills referred for taxation, than in other cases; but, if these circumstances alone were in all cases to be held sufficient ground for a taxation, no solicitor who continues to act for a client would be secure of any settlement during the life of his client; and the continuance of one of those suits which not unfrequently occur in this Court would prevent the possibility of any settlement between the solicitor and the client. It is, however, unnecessary to consider this point further, because, in this case, I find acquiescence, for from twenty-six to eighteen years, and the enjoyment of the forbearance during that time, and the consequent destruction of vouchers and delivering up of papers, and the important fact of the purchase by the

(a) p. 495. *suprà*.

(b) 1 V. & B. 126.

(c) 3 V. & B. 174.

(d) *Turn. & Russ.* 407.

the solicitor, with the privity of the client, and for his benefit, of part of the debt so secured, and the absence of any proof of improper dealing on the part of the solicitor, or of any such errors in the bills settled as the decided cases require for the purpose of opening an account settled, and sending a solicitor's bill, so long settled and secured, to a taxation.

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Having, in this case and in that of *Horlock v. Smith*, had the misfortune to differ from the Master of the Rolls and the Vice-Chancellor, I have endeavoured, by a careful examination of the cases, to ascertain the limits of the rule as laid down in them. To that rule, as I find it laid down, I am anxious to adhere, being persuaded that, whilst it affords ample protection to the client against any improper dealing and extravagant charges on the part of the solicitor, it does not deny to the solicitor that justice to which all men are entitled, or the means of settling their accounts, and of winding up their affairs, which, if the rule were to be further relaxed, it would be in most cases impossible for them to accomplish.

I am bound to act upon the opinion I have formed, that the settlement and security of 1819 has not been successfully impeached. The subsequent bills must be taxed, and the account founded upon the security of 1819 must be taken. All this would have been ordered upon the petition of Dr. *Sutherland*. The petition of Mr. *Winchester* was unnecessary, except for the purpose of obtaining a taxation of the bills prior to 1819; and, as it has failed in that object, it ought, I think, to be dismissed with costs.

It was objected, upon the authority of some of the cases cited, that Mr. *Winchester*, not being the client,

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could not have the bills taxed; but this is not a case for taxation simply under the statute; but *Dr. Sudherland* seeks to enforce payment out of a fund in court; and, when necessary and proper, in order to ascertain the amount of the charge, the Court will direct a taxation as between the party claiming the charge and the party representing the fund, who in this case is *Mr. Winchester*.

May 26, 27.
 June 3.

BROWN v. NEWALL.

A bill, praying for an injunction to stay an ejectment, stated that the Plaintiffs in equity had no defence at law: the bill was supported by an affidavit which contained the same statement; and an *ex parte* injunction was granted upon the bill and affidavit.

An order was afterwards made, dissolving the injunction; and a further order was subsequently made, by which the Plaintiffs in equity were directed to give judgment in the ejectment: Held, upon appeal, that the principles and practice of the Court did not warrant the last-mentioned order.

A party against whom an attachment has issued for disobedience to an order, may, notwithstanding the attachment, move to discharge the order.

IN the month of July 1836, *John Platt* was seised in fee simple, subject to a mortgage, of a farm called the *Holywell House Farm*, situate in the parish of *Acton*, in *Cheshire*, and was also possessed of certain personal property. By indentures of lease and release of the 21st and 22d of July 1836, *John Platt* conveyed the *Holywell House Farm* to *William Newall* and *James Plevin*, in fee, upon trust to sell, to pay off the mortgage, and to pay the remainder of the produce of the sale to himself. By a deed of the 23d of July 1836, *John Platt* assigned to *Newall* and *Plevin* all his personal estate, including the surplus produce of the sale of the *Holywell House Farm*, upon trust to sell, and to apply the same in payment of all sums of money which *Newall* and *Plevin*, or either of them, had become or should become liable to pay for the benefit and accommodation of *John Platt*, and then in payment of the debts of *John Platt*, rateably;

ably ; with a proviso, that they might, in order to avert actions, or for other cause, pay any creditors in priority to others, and that they might suspend or delay the exercise of the trusts, and that they should have uncontrolled discretionary power to admit any person claiming to be a creditor, upon such evidence as they should think proper.

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At the time of the conveyance above-mentioned, *Holywell House Farm* was in the occupation of *Joseph Platt*, as tenant to *John Platt*, at the yearly rent of 207*l.* After the conveyance was executed, *Newall* and *Plevin* induced *Joseph Platt* to attorn tenant to them, and to pay them a shilling, as part of his rent, for which they gave him a written receipt. They subsequently served him with notice, dated the 27th of *July* 1836, requiring him to quit at the usual commencements of the following spring, according to the usual style of holding, or at the end of the year's tenancy which should expire next after the end of one half year from the service of the notice. *Newall* and *Plevin* afterwards received from *Joseph Platt* the sum of 103*l.* 10*s.*, for rent due at *Lady-day* 1836, and gave him a written receipt for it, which was dated the 19th of *September* 1836. *Joseph Platt* also signed a memorandum, dated the same day, by which he agreed to deliver up to *Newall* and *Plevin* possession of the lands and of the farm house, at the usual times of quitting them respectively.

On the 15th of *November* 1836, a fiat in bankruptcy was issued against *John Platt*, under which he was adjudged a bankrupt ; and *Peter Brown* and *James Allwood* were appointed assignees of his estate and effects. The assignees, as soon as they had been appointed, gave notice to *Joseph Platt*, not to give up possession to the trustees (*Newall* and *Plevin*), but to continue in occupa-

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tion, and to pay rent to themselves, the assignees. *Joseph Platt*, accordingly, continued in possession.

On the 9th of *February* 1837, the trustees served a declaration in an action of ejectment commenced by them, in the Court of King's Bench, against *Joseph Platt*, for the purpose of recovering possession of the farm. The declaration stated two demises; one by the trustees, and another by one *George Davenport*, to whom they had let or agreed to let the premises. The assignees obtained the common order to defend this ejectment, as landlords.

On *Saturday* the 18th of *March* 1837, late in the evening, the trustees served notice of trial for the approaching assizes for *Cheshire*: the 18th was the last day for giving notice of trial. The commission day at *Chester* was the 29th of *March*.

On the 25th of *March* 1837 (which was *Easter* eve), the assignees filed a bill against the trustees of *John Platt*, for an injunction to restrain the action of ejectment; but *Davenport* and *Joseph Platt* were not made Defendants to this bill. The bill and an affidavit, sworn on the same day, in support of an intended application for an injunction, stated, that the act of bankruptcy upon which *John Platt* was adjudged a bankrupt, was the execution of the assignment before mentioned; that on the 20th of *December* 1836 he presented a petition to the Court of Review for the purpose of annulling the fiat, and that on the 27th of *January* 1837 he presented a supplemental petition for the same purpose; but that no order had been made on the petition, and that he had not brought it to a hearing; that, under the circumstances, the trustees must, by the rules of the common law, obtain judgment in
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their action, and recover possession of the farm; and that, at the time at which the assignees obtained the order to defend as landlords, they were ignorant of the fact of *Joseph Platt* having signed the memorandum of the 19th of *September* 1836, by which he agreed to give up possession; that as soon as they were informed of the existence of that document, namely, on the 6th of *March* 1837, they applied for and obtained a Judge's order for an inspection of the memorandum, and a stay of proceedings in the ejectment until after the inspection should have taken place; but that they could not obtain the inspection until the 20th of *March*; that as soon as a copy of the memorandum had been obtained by the assignees, it was laid before their counsel, who advised them, as the fact was, that the order to enable them to defend as landlords was erroneous, and that they were unable at common law to make any good defence to the trustees' title to recover in the ejectment; that the trustees had demised or agreed to demise the farm to some other person whom they intended to put in possession, and that that proceeding would tend greatly to the injury of the bankrupt's estate; that the trustees were acting in concert and collusion with *John Platt*, for the purpose of defeating the title of the assignees, and preventing them from collecting his estate and effects; and that the trustees, claiming under the assignment of the 23d of *July* 1836, had, as well before as since the fiat, possessed themselves of a considerable portion of the property belonging to *John Platt* at the time of his committing the act of bankruptcy, and that they had not applied it in payment of the creditors, but had handed over considerable portions of it to *John Platt*, and had retained the residue in their own hands; and that they intended to collect the remainder of the property and to convert it into money; and that the assignees were at the date of the assignment,

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ment, and still continued to be, creditors of *John Platt*. (a)

Upon this bill and affidavit, the Vice-Chancellor, on the 25th of *March* 1837, the day upon which the bill was filed, granted an *ex parte* injunction, restraining the trustees from all further proceedings in the action of ejectment, and from collecting the personal estate of *John Platt*, until answer or further order.

The trustees then gave notice of a motion, before the Vice-Chancellor, that the injunction might be dissolved, and that the assignees might pay the trustees' costs at law, rendered useless by the injunction, as well as the costs of the motion to dissolve. In support of this intended motion, affidavits were filed, in which it was stated, that at the time of the execution of the deeds of conveyance and assignment to the trustees, *John Platt* was not, and had not for several years previously been, a trader within the meaning of the bankrupt laws; that *John Platt* did not believe himself to be insolvent; that he was then sixty-seven years of age, and, in consequence of a variety of afflictions which had occurred in his family, unable to transact his own business; that the deeds of conveyance and assignment were executed for the purpose of indemnifying the trustees against certain sums for which they had previously and at that time become sureties for him; that the fiat had been all along disputed by *John Platt*, and that the petition to annul it still stood for hearing; that the farm had been let to *Joseph Platt* at an undervalue; that the trustees had used no false representations

(a) The bill and affidavit also alleged that the trustees were insolvent, but it appeared by subsequent affidavits that this allegation was not well founded.

sentations to induce him to attorn tenant to them, which he had done in the presence of *John Platt* ; that they had repeatedly offered to relet the farm to him (*Joseph Platt*) at 250*l.* per annum ; and that, upon his refusal to take it, they had let it to *Davenport* at 250*l.* per annum ; that *Joseph Platt* had been served with the declaration in ejectment on the 9th of *February*, in consequence of his having refused to give up possession of the lands of the farm on the 2d of *February* ; that the trustees had paid, on account of the trust estate, considerably more than they had received ; that they had not handed over any portion of the property to *John Platt*, and that they did not intend to collect any further parts of it, unless the fiat was annulled ; that, after the order for inspection was obtained, the assignees never applied for an inspection of the memorandum of the 19th of *September* 1836, although they had, in the mean time, inspected other documents in the cause, at the office of the trustees' *London* agents, but without asking for the memorandum ; that the Lord Chief Justice, (a) decided that the notice of trial should stand good ; that, although the injunction was dated the 25th of *March*, notice of it was not served upon the trustees' *London* agents until the evening of the 27th, when it was too late to apply to dissolve it in time to obtain a trial at the then approaching assizes ; and that the inspection of the memorandum was not purposely withheld.

It was also stated in the same affidavits, that the adjudication under the fiat was not made until the 22d of *December*, two days after *John Platt* had presented a petition to annul the fiat upon the ground that he was not a trader ; and that a supplemental petition became necessary, in order to bring the assignees before the Court ;
and

(a) As the Judge at chambers during the circuit.

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and that the solicitor for the petitioning creditor and for the assignees had purposely postponed the filing of affidavits, in opposition to the petition, until the 29d of *January*, on which day it stood in the paper, in order that the hearing might be delayed; and that two days before the 15th of *March*, when the original and supplemental petitions stood in the paper, fifteen further affidavits were filed in opposition to the petition, which affidavits had been sworn some days before, but kept back until that time, in order to delay the hearing still further; and that, the petitioner being obliged to ask for time to answer these affidavits, the hearing of the petition was further postponed until *Easter* term.

On the 12th of *April* 1837, the Vice-Chancellor ordered that the injunction should be dissolved with costs; and that the rest of the trustees' application should stand over, until after the petitions preferred by *John Platt* to the Court of Review should have been disposed of; with liberty to the trustees to apply in the mean time.

In pursuance of the liberty given by the last-mentioned order, the trustees, on the 21st of *April*, gave notice of a motion before the Vice-Chancellor that the assignees might be ordered to withdraw their plea in the action of ejectment, and to suffer judgment; or else that the costs at law of the trustees and *Davenport*, rendered useless by the injunction, might be paid to the trustees; and that the assignees might be ordered to deliver possession of the farm; the trustees undertaking to deal with such possession as the Court should direct, and not to let the farm otherwise than from year to year, and the trustees undertaking to proceed immediately to a trial at law, to try the alleged bankruptcy; and that the costs of the intended application might be paid to the trustees.

An

An affidavit, by *Davenport*, in support of this intended motion, filed on the 22d of *April*, stated, that he had taken the *Holywell House Farm* at 250*l.* per annum, as before mentioned; that the lease of the farm which he had before held expired at the usual commencements of the present spring; that his only reason for quitting that farm was, that *Holywell House Farm* was a cheaper and better farm at the rent of 250*l.*, than the other farm was at the rent which he was paying for it; that on the 2d of *February* last he gave up possession of the other farm, except the house, buildings, and boozey pasture; and that on the 12th of *May* he would have to give up possession of the house, buildings, and boozey pasture; that he was now keeping at the other farm twenty-six milking cows, besides horses, young cattle, and other stock; that unless he could have possession of *Holywell House Farm*, he would be wholly without a farm; and, when he should so deliver up possession of the house, buildings, and boozey pasture at the other farm, he would be wholly without a house for himself and his numerous family, and wholly without buildings and lands for his cattle and other live and dead stock; and that, unless possession of *Holywell House Farm* were given up to him, he would sustain a most heavy and serious damage, and, ultimately, irreparable loss. An affidavit sworn by Mr. *Weatherall*, the trustees' *London* agent, in support of the same intended motion, stated, that the petitions in bankruptcy came on to be heard on the 17th of *April*, when it was ordered, that they should stand over for a fortnight, in order that the trustees might, in the interim, submit to the jurisdiction of the Court of Review, by becoming co-petitioners with *John Platt*, or by presenting a short petition of their own; or else the petitions of *John Platt* should be dismissed with costs.

The motion having been made before the Vice-Chancellor, on the 28th of *April* 1837, his Honor ordered that

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that the assignees should, within four days after service, give judgment at law in the action of ejectment, and pay the trustees their costs of that application; but the order was to be without prejudice to any proceedings at law that the assignees might think proper to institute, and without prejudice to any proceedings in this cause.

By virtue of an order, dated the 26th of *April*, the assignees amended their bill, before the order of the 28th of *April* was made, and they then added *Davenport* and *Joseph Platt* as defendants.

On the 2d of *May*, the Court of Review dismissed *John Platt's* petitions with costs; but suspended, for the present, the enforcement of the order, so far as it directed him to pay the costs; and gave liberty to the parties to apply.

On the 8th of *May*, the assignees obtained the common injunction against the trustees, for want of an answer to the bill; but, on the 22d of *May*, the Vice-Chancellor, on the motion of the trustees, discharged that injunction with costs.

On the 18th of *May*, the assignees gave notice of a motion before the Lord Chancellor, to discharge the Vice-Chancellor's orders of the 12th and 28th of *April*. On the 22d of *May*, however, an attachment issued against the assignees for disobedience to the order of the 28th of *April*, which required them to give judgment in the action. On the 24th of *May*, they moved, before the Vice-Chancellor, for an order to restrain all proceedings upon the order of the 28th of *April* until the intended motion before the Lord Chancellor should have been disposed of, and that the attachment might be set aside. The Vice-Chancellor refused this motion with costs.

In
the

In opposition to the intended motion before the Lord Chancellor, *Davenport* made an affidavit, which was filed on the 20th of *May*, and in which he stated, that on the 12th of *May* he was to have left the house, buildings, and boozey pasture belonging to his former farm, but that the incoming tenant permitted him to occupy a part of the house and buildings until the 15th; that on the 12th he ought to have had possession of the house, buildings, and boozey pasture at *Holywell House Farm*; that he could not be accommodated at the former farm, longer than the 15th of *May*, on which day he left it; that he had then no place to which to go, and did not know what to do with his stock of cattle: and he described the manner in which his milking cows and other cattle had been distributed in small numbers among various friends, who had kindly taken them, at considerable inconvenience to themselves, in a very scarce season, in order to relieve him in his emergency; and he further described the manner in which his wife and children and servants had been also distributed.

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The intended motion before the Lord Chancellor was now made. The argument turned entirely upon that part of the motion which sought to discharge the order of the 28th of *April*, by which the Plaintiffs had been directed to give judgment at law. It appeared to be admitted, that the injunction was properly dissolved.

Mr. *Wigram*, Mr. *Bethell*, and Mr. *Addison*, in support of the motion, contended, that although the Court might, at the hearing, refuse to give a plaintiff relief, except upon terms, yet the Court had no power to put him upon the terms of giving up his legal right, seeing that he might at any time have dismissed his bill. They said, they were now convinced that the opinion that they had no defence at law was erroneous.

Mr.

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Mr. Knight, Mr. K. Parker, and Mr. James Russell, *contra*, argued, that whenever an injunction to stay proceedings at law had been improperly obtained, the Court would not only dissolve it, but would deprive the Plaintiff of the fruits of it; and would make every possible reparation for the injury which the Defendant had sustained; and would place the Defendant, if possible, in the situation in which, but for the injunction, he would have been: and they relied strongly upon the extreme loss and inconvenience which the injunction had occasioned to *Davenport*. They insisted, that the Plaintiffs must be bound by the statement which was contained in their bill and affidavits, and upon which the injunction was granted, viz. that they had no defence at law; and that the Court had therefore a right to take them at their word, and to put them upon terms to give judgment at law. They cited the following cases; *Anonymous* (a), *Morgan v. Morgan and Jones* (b), *Pulteney v. Warren* (c), *Grant v. Grant* (d), *Atkinson v. Atkinson* (e), *O'Donel v. Browne* (g), *McCarthy v. Maguire* (h), *The Princess of Wales v. The Earl of Liverpool* (i), *Jones v. Lewis* (k), *Wynne v. Griffith* (l), *Furnival v. Bogle* (m).

Mr. Wigram, in reply,

June 3.

The LORD CHANCELLOR.

This was an application to discharge an order of the Vice-Chancellor, dated the 28th of April 1837. That order

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| (a) 2 <i>Ca. in Ch.</i> 217. | (h) 1 <i>Molloy</i> , 47. |
| (b) 2 <i>Diok.</i> 643. | (i) 1 <i>Swanst.</i> 114. and 580.; |
| (c) 6 <i>Ves.</i> 73. | 3 <i>Swanst.</i> 567. |
| (d) 3 <i>Russ.</i> 593.; and 3 <i>Sim.</i> | (k) 2 <i>Sim. & Stu.</i> 242. |
| 340. | (l) 1 <i>Sim. & Stu.</i> 147. |
| (e) 1 <i>Ba. & Be.</i> 238. | (m) 4 <i>Russ.</i> 142. |
| (g) 1 <i>Ba. & Be.</i> 262. | |

order directed that the Plaintiffs should give judgment at law in the action of ejectment mentioned in the pleadings, and should pay the Defendants *Newall* and *Plevin* their costs of that application; but the order was to be without prejudice to any proceedings at law which the Plaintiffs in equity might think proper to institute, and without prejudice to any proceedings in this cause.

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Now the application, originally, was for an injunction, by the Plaintiffs, who are the assignees of a bankrupt; the fiat, although disputed, standing, and being a subsisting fiat.

The Defendants *Newall* and *Plevin*, on the 9th of February 1837, commenced an action of ejectment, by which they sought to recover possession of the house and farm in question, of which a conveyance had been previously made to them. After the ejectment had been allowed to proceed, an application had been made upon the eve of trial, without notice, to restrain the Plaintiffs in that ejectment from taking any further proceedings; the bill alleging no equity of any kind that I can discover, except that the Plaintiffs were assignees of the bankrupt, and that the Defendants claimed under the deed, which was alleged to have been an act of bankruptcy: stating, certainly, that there were documents in the possession of the Defendants, which it was necessary for the Plaintiffs to inspect before the trial, but stating no equity that I can discover, but the act of bankruptcy, which is no equity at all. However, the order for an injunction was made; and there was no time to apply to dissolve it before the trial.

Now, that that *ex parte* injunction was an order which ought not to have been made, is not in dispute. It has been subsequently dissolved, and nothing is attempted

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to be said in support of it at the bar; and it is impossible that it could have been sustained. The order was a departure from the known and established rule and practice of this Court. Nothing is so difficult as to bring within any general rule, every case in which a special injunction ought to be granted; but when an action has regularly proceeded, and is on the very eve of trial, an *ex parte* injunction to stop it is an order such as I have not before seen. The Vice-Chancellor appears to have stated that the order was made under some misapprehension of the facts: and, indeed, it is quite obvious that it must have been so, for the Vice-Chancellor could not have made the order, if the facts had been thoroughly understood. It is very probable that some facts were then supposed to exist which did not actually exist.

I am not entitled, however, to assume that the order was made upon any other grounds than those stated in the affidavit which was used upon the application for the injunction; and I am therefore to see whether, on that affidavit, the parties have suppressed or misrepresented facts, in such a way as was calculated to induce the Court to grant the injunction.

I am most unwilling to lay down any rule which should limit the power and discretion of the Court as to the particular cases in which a special injunction should or should not be granted: but I have always felt—and since I have been upon the bench I have seen no reason to alter my opinion—that extreme danger attends the exercise of this part of the jurisdiction of the Court, and that it is a jurisdiction which is to be exercised with extreme caution. It is absolutely necessary that the power should exist, because there are cases in which it is indispensable; but I believe that, practically, it does as much injustice as it promotes justice;

justice ; and it is, therefore, to be exercised with extreme caution. The Court can have no ground upon which it can proceed, in granting an *ex parte* injunction, but a faithful statement of the case ; and where the Court has found a party misstating the case, either by misrepresentation or suppression, the Court has always exercised its jurisdiction, for the purpose of repressing that practice : and I am desirous to abstain from putting, by anticipation, any limit to that power. The extent to which the Court is to go in so doing is only to be determined by the case itself ; but then it must appear, upon the affidavits, that there was such misrepresentation. Now, the affidavit upon which the *ex parte* injunction was obtained certainly does not state all the facts ; but the question is, whether there was any such suppression or misstatement as to lead the Court to grant the injunction. I do not find on that affidavit that description of misrepresentation or suppression, which, in my opinion, presented a case likely to procure a judgment on the application, but different from the case which really existed.

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Before remarking, however, upon the circumstances, with respect to which suppression or misrepresentation is supposed to exist in the affidavit, I will advert to the cases cited in support of the order now under appeal : it being borne in mind, that the injunction was dissolved on the 12th of *April*, and that on the 28th of *April* the order in question was made, by which the Plaintiffs are ordered to give judgment in the ejectment.

The first case referred to, in support of the order, was an anonymous case in the second volume of *Chancery Cases* (a), and that case, which is extremely short, and the

(a) 2 *Ca. in Ch.* 217.

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the circumstances of which do not appear, lays down this proposition, that where the Statute of Limitations has run, pending an injunction, the Court will restrain a debtor from taking advantage of the statute; that is all that is applicable to this case. How, and under what circumstances, and in what shape or form the question arose is not at all adverted to. That case does not go farther than many other authorities which establish that head of equity by itself, but fall very short of proving the proposition necessary to support this order, namely, not only that the Court has the jurisdiction assumed in the present order, but that it is to be exercised in a case like the present. The head of equity to which I allude is, that where, by the interposition of the Court to prevent an act rightfully or wrongfully intended, the Defendant has lost a remedy at law, the Court will give him a remedy equivalent to that from which the interposition of this Court has debarred him. That will be found to be the principle established in the case of *Pulteney v. Warren* (a); and in *Morgan v. Morgan and Jones* (b), Lord *Thurlow* lays down the same proposition. The latter case decided that equity would give interest on arrears of an annuity, the recovery of which had been prevented by an injunction in this Court. It was a case in which no objection was made to the exercise of the power of the Court; but it turned out that an annuitant, with a term of years and a power of entry and distress, had, by means of the injunction, been prevented from proceeding with an action of ejectment which she had commenced for the purpose of recovering the arrears. The bill, which was filed to restrain the action, prayed also an account of what was due, and offered to pay the amount; and the Court, therefore, in administering the equities between the two parties, thought it right to give interest on those arrears from the

(a) 6 Ves. 73.

(b) 2 Dick. 643.

the time of the filing of the bill. The case of *Grant v. Grant* (a) lays down the same proposition, and Lord Eldon there refers to the case of *Duxall v. Terrey* in *Shower's Parliamentary Cases* (b). *O'Donel v. Browne* (c) is to the same effect; and *Pulteney v. Warren*, which, undoubtedly, is entitled to the highest possible attention, establishes only the same principle which had been before laid down, namely, that where, by delay created by the Plaintiff in equity, the Defendant in equity has lost his remedy at law, equity will supply a substitute for the remedy so lost. But, in all those cases, the principle established is, that that of itself constitutes an equity. If so, it constitutes an equity to be administered in a suit to be instituted for that purpose, and giving each party an opportunity of stating his case.

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The Princess of Wales v. The Earl of Liverpool (d), has been supposed to be an authority for the present purpose, because an order was there obtained by a defendant against a plaintiff, for the production of a document; but, without saying anything of that case, it has no application; and I think, upon examination, it will be found to assume that the Court has no such jurisdiction as has been exercised in this case. *Jones v. Lewis* (e) is precisely the same case; Sir John Leach there followed *The Princess of Wales v. The Earl of Liverpool*. The cases of *Pickering v. Rigby* (g), and *Micklethwait v. Moore* (h), proceeded upon the ground that a defendant could not, upon motion, compel a plaintiff to produce documents

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| (a) 3 Sim. 340; see p. 364.; | (d) 1 Swanst. 114. and 580.; |
| 3 Russ. 598.; see p. 607. <i>et seq.</i> | 3 Swanst. 567. |
| (b) Page 15. | (e) 2 Sim. & Stu. 242. |
| (c) 1 Ba. & Be. 262. | (g) 18 Ves. 484. |
| | (h) 3 Mer. 292. |

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documents in his possession. In an anonymous case in *Dickens* (a), where an application was made to compel a plaintiff to produce a document, Lord *Thurlow* asked, "Did you ever know an instance of a defendant's applying against a plaintiff, even to produce deeds? There cannot be any; it hath been denied. If you want it, you must file a cross bill for the purpose." (b)

Another case cited was *McCarthy v. Maguire* (c), which is not very applicable to the present case, but in which an observation fell from Sir *Anthony Hart*, which seems to me to coincide with the opinion of the other Judges to whom I have referred. An application was there made for an attachment against parties who had sued out a writ in a manner which was said to be an abuse of the process of the Court. Sir *A. Hart* refused the application, and put this case: "Suppose an injunction was granted *ex parte*, or a writ of *ne exeat regno*, and it appeared they were obtained upon misrepresentation, the Court would quash or dissolve them with costs, but it would not attach the parties." There he puts certainly a very strong case; though not a proceeding treated as a contempt of Court, and there is no authority for so doing; and Sir *A. Hart* says that the Court would dissolve the injunction with costs; a very inadequate remedy, often, certainly: but his opinion would seem to have been, that the power of the Court goes no further. Then *Wynne v. Griffith* (d) was cited, which was a bill for a specific performance of an agreement for the sale of an estate, and to restrain an action for the deposit. The injunction having been continued

(a) 2 *Dick.* 778.(c) 1 *Molloy*, 47.

(b) See also *Spragg v. Corner*,
2 *Cox* 109.; and *Penfold v.*
Nunn, 5 *Sim.* 405.; see p. 409.

(d) 1 *Sim. & Stu.* 147.

continued on the merits, the Defendant afterwards moved that the Plaintiff might be ordered to pay the deposit into Court. Sir *John Leach* was of opinion that the facts of the case did not warrant the motion; and, therefore, it was not necessary to come to any decision on the shape and form of the order; but he said that he might have considered the application as being, in principle, a motion to dissolve the injunction, unless the Plaintiff paid the money into Court; which shews that, in his opinion, that was the only shape and form in which the adverse order could be made against the Plaintiff.

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Not only do not these cases support the order, but they all assume that such an application cannot be made by a defendant against a plaintiff; and to this effect is Lord *Lyndhurst's* decision in *Furnival v. Bogle* (a), where money had been attached in the Lord Mayor's Court, an injunction to restrain the proceedings in the attachment had been obtained, and the money had been paid into Court. The injunction was subsequently dissolved, and it was then urged that the money ought to be paid out of Court, to the parties who had attached it; but Lord *Lyndhurst* said it was impossible to maintain that position; and for this reason, that there was no judgment at law ascertaining their legal right, or the amount of their legal demand; and that if the Court were to order the money to be paid to them, it would, in effect, give judgment on the proceedings at law: and the result was, that the Court retained the money, with liberty to the parties to apply when the proceedings at law should have ascertained to whom the money belonged.

Now,

(a) 4 *Russ.* 142.

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Now, here, there being an ejectment in which, if it is properly framed for that purpose, the question of the bankruptcy is to be decided, but certain transactions having taken place between the Plaintiffs at law and the tenant, which are supposed by the Plaintiffs in equity to make it impossible for them to bring forward in the action the question of the bankruptcy, the parties applied for an injunction, after stating the facts, the attornment, and the action of ejectment; and then drawing the conclusion of law, that there could be no defence to the ejectment, inasmuch as the Plaintiffs had come in as landlords, and were therefore bound by all that the tenant had done; stating that as a legal inference, and as a ground for the injunction. The Vice-Chancellor, when he made the order now under appeal, seems to have proceeded very much upon this, namely, that because the Plaintiffs had stated that the trustees were entitled to recover judgment in the ejectment, and that they (the assignees) had no defence at law, he was entitled to take them at their word, and that they were bound by their acknowledgment that they had no defence at law. Now, it is a rule of pleading that, although a party is bound by the facts which he states, he is not bound by his statement of the legal consequences of those facts. It is for the Court to judge what are those legal consequences. Whether he states that he is advised that such and such are the legal consequences, or whether he states supposed consequences, without saying that he is so advised, I cannot be of opinion that a party is bound by any statement which he may make of the legal consequences arising from the facts stated.

If, therefore, this order is to stand, it must stand as an order of the first impression: there is no previous case to be found, upon the authority of which it can be supported; and no principle upon which it can stand is

to

to be extracted from any case which has been cited, or which I have been able to find. On the contrary, I find in the cases, that, although the Court has laboured to do indirectly what purports to be done by this order, it has always repudiated the jurisdiction to do it directly.

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Some facts are stated to be omitted or inaccurately represented in the affidavit upon which the injunction was granted. I have already stated, however, that there was not that species of misrepresentation or omission which would have had a tendency to lead the Court to issue the injunction. The ground upon which the Vice-Chancellor seems to have principally proceeded is the omission to state that *Davenport*, the person by whom the legal demise is supposed to have been made, was not made a party to the suit in equity. Now, that, I apprehend, could not make the least difference in the case. The question is, whether the omission would improperly lead the Court to the order which it made. Whether, in fact, the ejectment was brought by the defendants upon their own demise, or on the demise of their tenant, could make no difference as to the merits of the order for the injunction. In either case, the action could not go on; for it would be their action; they could not go on upon the demise of *Davenport*, if, in point of fact, it were their action. If, on the other hand, *Davenport* was a substantive Plaintiff in the ejectment, if it was his proceeding, then he was not a party to the suit, and he would not be restrained.

Then it is said that there was misrepresentation in stating that the Plaintiffs had not been able to obtain an inspection of a certain agreement until the 20th of *March*. Now, on that subject, the real question is, whether that would make any difference—whether this Court has any equitable jurisdiction to prevent a trial

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trial taking place, merely because a party could not see a document. That circumstance, clearly, could not give jurisdiction. It would be a non-compliance with the Judge's order, directing the inspection; but it is quite clear that there is no equity in this Court upon such a ground. It might be a ground upon which the Judge would put off the trial; but, in point of fact, circumstances are stated, which very much relieve the party making the affidavit from the imputation attempted to be fixed upon him. In one of the affidavits it is stated, that at the time at which the order for inspection was obtained, the document was in the possession of the town agents of the Defendants in equity, and ready to be produced to the Plaintiffs, their attorney or agent, whenever required so to do. In answer, however, to that statement, another affidavit states that the former deponent did not inform the present deponent, that the Defendants' agents had the agreement in town; but, on the contrary, it was understood that they would inform the Plaintiffs' town agent, as soon as they were in a situation to give inspection. It would seem, therefore, that the party who was to produce the agreement, was to inform the other party at what time the inspection was to take place; and, in point of fact, it did take place on the 20th of *March*. Assuming that statement to be accurate, there was no incorrectness in stating that the Plaintiffs were unable to obtain an inspection until that day. Another instance of omission stated is the omission to mention that when the Chief Justice ordered the production of that document — there having been previous notice of trial given, which in strictness would be irregular — it was not alleged in the affidavit, in mentioning the second order, that the Chief Justice had directed the notice of trial to stand. Now, it really does seem to me, that that omission was not at all calculated to lead the Court to pronounce the order, but would have had rather an opposite

opposite effect. The application for the injunction, assumes that the trial is to take place; and the only ground for making it *ex parte*, is that there is not time to give the other party notice, and that it is necessary to interfere immediately. I cannot, therefore, suppose, that the Court was induced to make the order by the omission of the statement last alluded to.

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I have looked through these affidavits with very great care; an order of the Vice-Chancellor being the subject of appeal, and involving a very important question of practice. I find no authority upon which the order can be supported. I think that an injunction has been obtained, which ought not to have issued; but I do not find, either in the practice of the Court, or in the facts of the case, any ground upon which I could support this order.

Mr. *Knight* then applied to the Lord Chancellor, to grant him such an order as was asked, in the alternative, by the Defendants' notice of motion before the Vice-Chancellor, dated the 21st of *April*; but the Lord Chancellor said, that the same reasons upon which he had come to the conclusion which he had expressed on the first part of that notice of motion, induced him to come to a similar conclusion with respect to the second; and his Lordship added, that, according to his opinion, no order ought to have been made upon that notice of motion at all.

Upon the Plaintiffs' motion, which is above reported, being opened by Mr. *Wigram*, Mr. *Knight* took a preliminary

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liminary objection to the Plaintiffs' being heard, inas-
much as they were in contempt; an attachment having
issued against them for disobedience to the order of the
28th of *April*, which attachment they did not now seek
to discharge.

The LORD CHANCELLOR over-ruled the objection,
upon the ground that the object of the present motion
was to discharge the order of the 28th of *April* itself;
and, of course, therefore, to strike at the root from
which the attachment had proceeded. (a)

(a) His Lordship had acted upon the same principle in several
previous cases.

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BETWEEN

EDWARD HENRY SIEVEKING - Plaintiff;

Jan 27. 50.
March 17.
July 28.

AND

HEINRICH BEHRENS, JOHANNES CHRISTOPH FEHLING, HENRY WILLIAM LEBRECHT CRUSIUS, and WILLIAM VON MELLE, - - - Defendants.

THIS was an interpleading suit.

The bill, which was filed on the 13th of *January* 1837, stated, that in and for some time prior to the year 1836, *Henry Diedrich Beel* and *Charles William Witthauer* carried on business in copartnership together as merchants, under the firm of *Beel* and Co. in the town of *Lubeck* in *Germany*, and that the Plaintiff during the same period carried on, and does still carry on, the business of a merchant in the city of *London*; and that, before their bankruptcy or insolvency after mentioned, *Beel* and Co. consigned to the Plaintiff goods and merchandize for sale, which the Plaintiff from time to time sold for the house of *Beel* and Co. upon commission, and the

By the common order for an injunction, in an interpleading suit, the injunction is directed to issue upon bringing the fund in question into Court; and if, without the special direction of the Court, the order is so drawn up that it does not make the bringing the fund into Court a condition pre-

cedent to the issuing of the injunction, the order will be discharged for irregularity.

Semble, if there is not time to bring the fund into Court, a special order will be made to provide for the emergency.

A party against whom such a double demand is made as to entitle him to file a bill of interpleader, is not bound to file it, so long as the course of proceeding taken by the different claimants is such as, if persevered in, will determine their respective rights, as between themselves, without the intervention of this Court by interpleader.

Where the Court sees that the continuance of the injunction in an interpleading suit, in full force, may have the effect of enabling a stranger to deprive the parties to the suit of the legal rights which they have already acquired, the injunction will be suspended so far as to allow proceedings at law to go on to judgment.

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Plaintiff from time to time accounted with the firm of *Beel* and Co. for the produce of such sales, after deducting the usual commission, expenses of sale, and other expenses :

That at the time of the bankruptcy of *Beel* and *Witthauer* a balance of 100*l.*, or thereabouts, was due from them to the Plaintiff, but the Plaintiff had in his hands certain goods theretofore consigned to him, on account of the house of *Beel* and Co. for sale, and which had been since sold; and after deducting the balance due to the Plaintiff, and making the usual and proper deductions for commission and expenses and charges, there remained a balance of 877*l.* 0*s.* 5*d.* in the hands of the Plaintiff :

That on the 24th of *March* 1836, *Henry William Lebrecht Crusius*, now out of the jurisdiction of the Court, commenced an action of debt in the Lord Mayor's Court in the city of *London*, against *Beel* and *Witthauer*, and on the same day attached the monies and goods of *Beel* and *Witthauer* in the hands of the Plaintiff, according to the custom of the city of *London*, for a debt or in part satisfaction of a debt of 1400*l.* and upwards, stated by him to be due from *Beel* and *Witthauer* to him, *Crusius* :

That on the following day, viz., the 25th of *March* 1836, *William Von Melle*, of *Old Broad Street* in the city of *London*, merchant, commenced an action of debt in the Lord Mayor's Court against *Beel* and *Witthauer*, and on the same day attached the monies and goods of *Beel* and *Witthauer* in the hands of the Plaintiff, according to the custom of the City, for a debt, or in part satisfaction of a debt, of 1300*l.* and upwards, stated and

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sworn by *Von Melle* to be due to him from *Beel* and *Witthauer* :

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That on or about the 7th of *May* 1836, *Heinrich Behrens* and *Johannes Christoph Fehling*, both of *Lubeck*, merchants, now out of the jurisdiction of the Court, claiming as assignees of the estate and effects of *Beel* and *Witthauer*, who, as they stated, became and were declared bankrupts, according to the laws of *Lubeck*, filed certain proceedings in the Lord Mayor's Court, called in that court bills of proof, one against *Crusius*, and another against *Von Melle*, thereby undertaking to prove to that court, that the monies and goods so attached, were not the monies and goods of *Beel* and Co., but of them, *Behrens* and *Fehling*, as assignees; and that on the 9th of *July* 1836, the bill of proof as against *Crusius* came on to be heard in the Lord Mayor's Court, when a verdict was found for *Behrens* and *Fehling*, subject, however, to the opinion of the Court on some point of evidence, which point had not yet been decided by the Court; and that no further proceedings had been taken on that bill of proof; and that on the same day, the bill of proof against *Von Melle* also came on to be heard, when a verdict was found for *Behrens* and *Fehling*, subject, however, as in the other case, to the opinion of the Court on some point reserved; but that judgment had in the latter case been given, on the point reserved, in favour of *Von Melle*, and against *Behrens* and *Fehling*, and the *postea* endorsed and entered up accordingly: but the Plaintiff, as garnishee in the attachments, not being a party to the bill of proof or proceedings thereon, referred to the same or the record thereof:

That *Von Melle* was now at liberty to proceed in his attachment, and that he had given notice of trial in
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the Lord Mayor's Court for *Saturday* next, the 14th of *January*, and that he intended to proceed according to notice, and to obtain judgment thereon against the Plaintiff; and that if judgment should be obtained by *Von Melle* in his attachment on *Saturday* next, execution might be issued on the following *Monday*, and the Plaintiff's person taken in execution:

That on the 24th of *December* 1836, *Behrens* and *Fehling* filed their bill in this Court against the Plaintiff and *Von Melle*, stating, amongst other things, the mode of transacting business between the house of *Beel* and Co. and the Plaintiff; the bankruptcy of *Beel* and Co.; and that they (*Behrens* and *Fehling*) were assignees of, and entitled to, all the estate and effects of the bankrupts, including the monies in the hands of the Plaintiff; and stating that *Von Melle* had, on the 25th of *March* 1836, commenced his action against *Beel* and *Witthauer*, in the Lord Mayor's Court, and had attached their goods in the hands of the Plaintiff, in part satisfaction of his demand, and that that attachment had not been tried, but was still pending: and that *Von Melle* intended to proceed to trial therein, and to obtain thereby the balance of money in the hands of the Plaintiff; and therefore praying that an account might be taken of the merchandize which had been from time to time consigned by *Beel* and *Witthauer* to the Plaintiff, and of all sums of money which had been received by the Plaintiff in respect of the sale thereof, and otherwise on account of *Beel* and *Witthauer*; and that a like account might be taken of all sums of money which had been properly paid by the Plaintiff to or for *Beel* and *Witthauer*; and that the balance of those accounts might be ascertained; and that a like account might be taken of such parts of the merchandize, consigned by *Beel* and *Witthauer* to the Plaintiff, as then still remained in his hands; and that

that all necessary directions might be given for the taking of such accounts; and that the Plaintiff might be decreed to pay to *Behrens* and *Fehling*, as assignees, the balance of monies which should be found due from him on taking the accounts; and that he might be decreed to deliver up to *Behrens* and *Fehling*, as assignees, the merchandize which should be found, on taking the accounts, to be in his possession; and that *Von Melle* might be restrained, by injunction, from proceeding to trial on his attachment, and from taking any proceeding at law to recover possession of the merchandize, monies, and effects, belonging to the estate of *Beel* and *Witthauer*, in the hands of the Plaintiff (*Sievekings*); and that the Plaintiff (*Sievekings*) might be in like manner restrained from paying over or delivering up such monies and goods to *Von Melle*, or to any person except *Behrens* and *Fehling*:

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That the Defendants to this bill had appeared; and that notice of motion had been served on the Plaintiff (*Sievekings*), and the other Defendant in that cause, that an injunction would be applied for against the Plaintiff (*Sievekings*), and that other Defendant, pursuant to the prayer of the bill, on *Friday*, the 13th of *January* 1837, before the Vice-Chancellor; but that no answer had yet been put in to the bill:

That *Crusius* was not made a party to the bill of *Behrens* and *Fehling*; and that neither the proceedings taken by him nor those taken by *Behrens* and *Fehling* in the Lord Mayor's Court were stated in that bill:

That *Crusius* claimed to be entitled to the benefit of priority, by virtue of his attachment, and threatened to proceed in his attachment in the Lord Mayor's Court; and that he had given notice that he intended to apply

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to that Court on *Saturday* next, the 14th inst., when the action or attachment of *Von Melle* was to come on for trial, that he might have priority to *Von Melle*, and have execution against the Plaintiff, because he commenced his action in that Court, and issued his attachment therein, before *Von Melle*, or for some other reason; and that the Plaintiff was advised, that if *Crusius* should not succeed in such application, or should not make such application to the Court, and *Von Melle* should obtain execution against the Plaintiff, and the Plaintiff should pay him the sum of 877*l.* 0*s.* 5*d.*, before-mentioned, *Crusius* might afterwards take further proceedings in his attachment, and obtain judgment against the Plaintiff, and recover that sum notwithstanding such payment.

The bill charged, that the Plaintiff was ready and willing to pay the sum of 877*l.* 0*s.* 5*d.* into Court, in order that the several parties claiming the money might interplead and settle their claims amongst themselves; the Plaintiff not now claiming, and never having claimed, any right or title thereto, and being ready and willing, and thereby offering to pay the same into Court.

The bill prayed that the Defendants might interplead and settle and adjust their demands between themselves, the Plaintiff being desirous that the sum of 877*l.* 0*s.* 5*d.* should be paid to such of them as should be found to be entitled thereto; and that the Plaintiff might be at liberty to pay the same into Court, which he thereby offered to do; and that the Defendants might be restrained by injunction from taking any farther proceedings, either at law or in equity, against the Plaintiff, touching the sum of 877*l.* 0*s.* 5*d.*, or the goods; and particularly that the Defendants might be restrained from proceeding by attachment or other process in the
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Lord Mayor's Court, either against the Plaintiff, or whereby the Plaintiff, or his goods, or the before-mentioned money or goods, might be attached or taken in execution.

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The allegations in the bill having been supported by affidavit, an *ex parte* injunction, in the terms of the prayer, was issued by the Vice-Chancellor on the day on which the bill was filed. The order for the injunction, as drawn up, directed that the injunction should issue, and that the Plaintiff should pay into Court the sum which he stated to be in his hands. The money was not paid into Court until the 20th of *January*. On the 26th of *January*, the Vice-Chancellor discharged the order, and dissolved the injunction, and stated that the order was irregular, inasmuch as it ought to have made the payment of the money a condition precedent to the issuing of the injunction.

The Plaintiff appealed from His Honor's decision.

Mr. *Wigram* and Mr. *Stinton*, in support of the appeal, said that, according to the practice of the Accountant-General's office, the money could not have been paid into Court before the trial, which was fixed for the 14th of *January*, would have taken place (a), and, therefore, that if the order for the injunction had been made conditional upon the previous payment of the money into Court, the injunction would have come too late. They argued that it could not be an inflexible rule of the Court, that

(a) It was stated that the order could not have been drawn up until, at all events, the next day; and that the Accountant-General would not receive money upon the authority of minutes of an order, unless the minutes were allowed to remain in his office two or three days.

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that the money should be paid into Court before the injunction could issue; for, if so, the consequences would be, that, in cases like this, in injunctions to stay proceedings at law upon warrants of attorney, or in any other pressing case, the order for the injunction would be unavailable. They admitted, however, that the impossibility of paying the money into Court, in this case, sufficiently soon to obtain the injunction in due time, was not particularly pointed out to the Vice-Chancellor; although, as the dates were all stated to His Honor, that result must have been obvious.

Mr. O. Anderdon, *contra*, for *Von Melle*, said that the Court gave credit to the parties applying for an injunction that they would have the order drawn up in the usual terms; and that if they drew it up in irregular terms, they must submit to have it discharged: and he said also that the Plaintiff had misrepresented the case to the Vice-Chancellor in the first instance.

The LORD CHANCELLOR said that if a party asks for a particular order, but wishes to have it made in a form which is different from the usual form, the attention of the Court ought to be called to the circumstances which render the variation necessary. It might be very true, that in this case, the dates would have shewn that the order, if drawn up in the common form, would have been of no use to the Plaintiff; but they were not brought under the Vice-Chancellor's attention for the purpose of obtaining a variation in the common order; and a very severe duty would be imposed upon the Court, if the Court were required to foresee all the consequences of an order for which a party might think fit to apply. As the common order in an interpleading suit was asked for in this case, and the Court intended to make the common order, but the order had been drawn up by the Plaintiff in an
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irregular form, it could not stand. It appeared to His Lordship that the order, as drawn up, was irregular, and ought to be discharged. His Lordship added, however, that it did not appear that the Plaintiff had made any misrepresentation of the facts to the Vice-Chancellor, or that there had been any attempt on his part to obtain an improper order.

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The original order for the injunction having, therefore, been discharged by the Vice-Chancellor, and His Honor's decision having been affirmed by the Lord Chancellor, an application was now made to the Lord Chancellor for an injunction in the terms of the prayer of the bill; and the affidavits, upon the merits, which had been filed in support of the application to the Vice-Chancellor to discharge the order, were read.

These affidavits contained statements tending to shew that *Crusius's* attachment could not be supported, inasmuch as his debt, if any, accrued beyond seas, and not within the city of *London*, and that the circumstance of his having issued his attachment before *Von Melle* would not avail him, as, by the custom of the city, the attaching creditor who first obtains judgment is entitled to priority of payment. It was also suggested, by one of the same affidavits, that the Plaintiff's delay in filing his bill arose partly from a desire to retain the money in his hands.

Mr. *Wigram* and Mr. *Stinton*, in support of the application, said that although, perhaps, the Plaintiff would have been justified in filing a bill of interpleader sooner than he did, there was no absolute or apparent necessity for his doing so until the time at which the present bill was filed; and, at all events, delay alone would be no argument against a Plaintiff in a bill of interpleader; for

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a Plaintiff in such a suit who delayed filing his bill until it was absolutely necessary, was entitled to greater favour at the hands of a Court of Equity than a Plaintiff in any other kind of suit, inasmuch as such a proceeding, although attended with no expense to him, was very expensive to the parties claiming the property, and he had every temptation to take that step for his own protection at other persons' cost at the earliest possible opportunity. They cited *Warrington v. Wheatstone* (a), and *Vicary v. Widger*. (b)

Mr. O. Anderson, *contra*, for the Defendant, *Von Melle*, submitted that the Lord Chancellor would not, by reviving the injunction, give the Plaintiff the benefit of the dissolved injunction, which it appeared that the Plaintiff had improperly obtained. If that injunction had not been granted, *Von Melle* would have had the money in his pocket on the 16th of *January*. He contended that the length of time which the Plaintiff had allowed to elapse precluded his now filing a bill of interpleader; *Cornish v. Tanner* (c), *Robins v. Hedges* and *Tanner*. (d) He also cited *Pulteney v. Warren* (e), and *Grant v. Grant*. (g)

Some dispute then took place upon the question, whether the Recorder had not in fact decided against *Crusius* upon the bill of proof brought against him, and whether payment under either of the attachments would not be a protection to the Plaintiff against any other demand. In the result, the Lord Chancellor said that as he should see the Recorder on the next day, he would then

(a) *Jac.* 202.

(e) 6 *Ves.* 73.

(b) 1 *Sim.* 15.

(g) 3 *Russ.* 598.; [and 3 *Sim.*

(c) 1 *Fa. & Jern.* 353.

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(d) *V. C.* 26th Nov. 1826. MS.

then ascertain from him, whether *Crusius's* case had been decided or not.

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BERENS.

The LORD CHANCELLOR.

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This case stood over for the purpose of enabling me to ascertain what was the state of the proceedings in the Lord Mayor's Court; the question being, whether those proceedings had so far advanced as to exclude one of the attaching parties, namely, *Crusius*, from the character of an attaching party; and I have ascertained that, although there was a verdict against him upon the bill of proof, and although, by the practice of the Lord Mayor's Court, there is no power of granting a new trial, yet the judgment is not in such a state as to be conclusive against his claim. Other proceedings are open to him according to the practice of that Court, which will enable him to raise the question there. The result is, that he cannot be considered as excluded from the character of an attaching creditor. There are, therefore, two attaching creditors, and the curators under the foreign bankruptcy of the original debtors, the persons whose money is in the hands of the party who has filed the bill of interpleader.

These circumstances, no doubt, raise a case of interpleader, and the only question is, whether what has already taken place is of sufficient weight to exclude the Plaintiff in this suit from the benefit to which, according to the ordinary practice, he would be entitled. Now, the proceeding by interpleader, although very necessary for the protection of a party upon whom two inconsistent claims are made, is, undoubtedly, in many cases, a severe proceeding against the person who is in fact entitled. He is in the course of establishing his legal right, and recovering a debt or duty due to him,

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"when this Court intervenes, and deprives him of the means of establishing that legal right, because some other person, who appears, ultimately, to have no title at all, gives this Court jurisdiction by way of interpleader, by setting up a claim; and I think it would not be expedient to lay down any rule or adopt any practice by which parties entitled to an interpleader would be much encouraged to come here; because it is much more beneficial to the parties really interested in the debt or duty, if their own proceedings are such as to bring the claims between them to an issue, that that object should be attained without a bill of interpleader. This, therefore, is not a case in which I think much weight is to be attached to the circumstance of the Plaintiff not having come here in the first instance. On the contrary, I think a party who comes here, when necessary, but who abstains from coming until the necessity arises, is more deserving of the favour of the Court, than one who comes, regardless of the proceedings of others, and looking only to his own protection.

It appears, from the proceedings in the Lord Mayor's Court, that so long as there were only two attaching parties, the proceedings there would have protected the debtor, inasmuch as that party who should have got judgment first would have been entitled to priority in the distribution of the fund; and I think the Plaintiff in the interpleading suit was right in abstaining from coming here, so long as matters were in that state. Then the curators of the estate of the debtors intervened, and disputed the title of the two attaching parties. That also was likely to lead to a result which might have been conclusive as to the claims of the parties, and have prevented the necessity of interpleading; because if those curators had succeeded in both their suits, the two attaching creditors would have been excluded

as against the curators, and the curators would have been the only persons entitled to the money. It happened, however, that in these two suits by the curators, they succeeded in one, that is, they obtained a verdict in one, and had a judgment against them in another, which other I must take not to be conclusive as to the rights of the parties; and that result did not ultimately take place until, I think, the 10th of *December* last.

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SHEPHERD
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BENNETT.

Bekrens and *Fehling*, the curators, having failed in their suit against *Von Melle*, one of the attaching creditors, filed their bill in this Court, on the 24th of *December*, again asserting their right. Then, on the 13th of *January*, the present bill of interpleader was filed; I think quite sufficiently early, looking to the course of proceeding in the Court below; because then, undoubtedly, it was necessary to seek protection, there being a state of proceedings below, making it impossible that the proceedings there could be looked upon as any security, so as to enable the party having the money to ascertain to whom ultimately he might safely pay it: and, accordingly, on the 13th of *January*, he filed a bill of interpleader, and on the same day obtained the Vice-Chancellor's order. Now that order was obtained without any misrepresentation of facts. There is no imputation against the conduct of the party obtaining that injunction of having imposed upon the Court, by having misrepresented the facts; but the Vice-Chancellor, when the case came before him again, discharged that order, and dissolved the injunction, on the ground that he had not been aware that he was not making the ordinary order. It is said, and said truly, that, although the Court is not likely to have so particularly compared the dates with the practice in cases of interpleader, as to have followed out the consequences of what was asked, yet that, if the attention of the Court had been drawn to it, or if the Court had by itself compared

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pared the practice with the period within which the injunction must have been obtained, it must have seen that the usual order would not answer the purpose. The Court, however, was not apprised of that, or at least did not advert to it, considering that the usual order was made. I think the Vice-Chancellor was right in not supporting an order drawn up under those circumstances; but still, when a party states all the facts to the Court, it is rather too much to say that, because an order is drawn up in mistake, he shall lose all the benefit to which he would have been entitled, if the attention of the Court had been drawn to the particular facts of the case. I cannot for a moment doubt, that if the Court had been apprised that the order asked for was an unusual order, justified only by the peculiar circumstances of the case, and if the Court was of opinion, as I am, that the case was one to justify an interpleader, the Court would have made a special order for the purpose of giving the party the benefit of an injunction in the interpleading suit. Therefore, although I think the order was rightly discharged, I do not think the course of proceeding of the party who obtained it was so far wrong as to prevent him from applying for a special order. The money is now actually in Court; and, therefore, the objection that was made before cannot apply. I think this a case in which I am bound to make an order for an injunction as in an interpleading suit.

An order was then made, as of the 27th of *January*, by which it was ordered that an injunction should be awarded against all the Defendants, to restrain them from taking, commencing, or prosecuting any further or other proceedings either at law or in equity against the

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the Plaintiff concerning the before-mentioned sum of 877*l.* 0*s.* 5*d.*, and from proceeding by attachment or other process in the Lord Mayor's Court against the Plaintiff, or whereby the Plaintiff, his goods or chattels, might be attached or taken in execution, until the Defendants should fully answer the Plaintiff's bill, or the Court make other order to the contrary.

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The Defendant *Von Melle*, upon putting in his answer, moved, before the Lord Chancellor, that his Lordship's order for an injunction might be discharged, with costs, or otherwise; that the sum of 877*l.* 0*s.* 5*d.*, paid into Court by the Plaintiff, might be paid out to *Von Melle*; and that the Plaintiff might pay the costs of the application: or that the order and the injunction thereon might be so varied, or qualified, or limited, as to make it restrict the issuing of execution, or the taking in execution the Plaintiff, his goods or chattels only, until the Court should make other order to the contrary; and that *Von Melle* might be at liberty to proceed to trial and take judgment upon his attachment.

March 17.

None of the other Defendants had answered.

Mr. *Jacob* and Mr. *O. Anderdon*, who appeared for *Von Melle* in support of the motion, stated that, according to the practice in the Lord Mayor's Court, whenever there were more attachments than one against the same goods, the attaching creditor who first obtained judgment was entitled to priority, notwithstanding that the attachment of another creditor might be of earlier date, and that the judgment upon it might have been delayed by reason of the Judge of the Court taking time to consider.

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Mr. *Richards* and Mr. *Loftus Wigram*, who appeared to oppose the motion on behalf of *Crusius*, said that their client was advised that no proceedings upon a prior attachment, short of execution, could protect the garnishee against a subsequent attachment.

Mr. *Tinney* and Mr. *Randell*, for *Behrens* and *Fehling*, opposed the motion, and argued that an injunction obtained by a Plaintiff in an interpleading suit could not be dissolved on the application of one Defendant, unless the answers of all the other Defendants had come in; *Hyde v. Warren*. (a) [The Lord Chancellor observed that in that case the Plaintiff made the objection.] They also cited *Solomons v. Ross*. (b)

Mr. *Wigram* and Mr. *Stinton* appeared for the Plaintiff.

The LORD CHANCELLOR.

Whether the proceedings which have taken place in the Lord Mayor's Court are final or not, whether they are to be considered as nonsuit or as final judgment, or whether, according to the practice of that Court, it is still open to the alleged assignees to take further proceedings there, are questions with which I do not consider that I have anything whatever to do, and they form no part of the ground upon which I proceed. The ground upon which I do proceed, is that, until the rights of the attaching creditors shall have been ascertained, nothing can be decided with respect to the property; because if, by the custom, one of the parties has acquired a right to the property, this Court cannot interfere with that right. This can only be ascertained
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(a) 19 Ves. 322.

(b) 1 H. Bl. 131. n.

in the Lord Mayor's Court; and all the parties litigant are parties to the proceedings there. It is quite certain that the rights of the assignees cannot be disposed of, or adjudicated upon, until the rights of the attaching creditors shall have been disposed of.

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I find also, and it is not disputed, that the effect of the injunction may be, not only to prevent the rights of the attaching creditors from being ascertained, but to permit some third party to intervene, and to obtain a title against both, which would be working a direct and palpable injustice against the parties who were proceeding to establish their claims. The attention of the Court having been drawn to that consequence of continuing the injunction, such a result will not be permitted to take place.

I do no one an injury by the course which I propose to adopt; because nothing which may be done in the Lord Mayor's Court can prejudice the equities of the parties in this Court. If the rights of the parties are legal rights, then they must be established by a Court of competent jurisdiction: there is no reason why all necessary proceedings for the purpose of establishing them should not be taken. If, on the other hand, the rights of the parties are not legal rights, or if there are equities paramount to the legal rights, they can be established as well before as after the proceedings in the Lord Mayor's Court, which I propose; and the sole question is, whether the parties are to go on to ascertain what are the rights of the attaching creditors. I propose then, that all parties should have liberty to take all such proceedings in the Lord Mayor's Court as they may be advised. The injunction will, of course, be continued, as to execution upon any such proceedings; and I do not
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at all interfere with whatever may be the rights of the parties to the suit in this Court. The judgment in the Lord Mayor's Court must be dealt with as this Court shall direct. If Mr. *Tinney's* clients, *Behrens* and *Fehling*, ask for liberty to defend the attachments, there is no reason why they should not have it.

Mr. *Tinney* declined taking liberty to defend the attachments.

Some discussion arose upon the terms of the order; but, as it was ultimately drawn up, it stood thus:—

“His Lordship doth order that the injunction, so far as it restrains execution, be continued until the further order of this Court; and the Defendants *Heinrich Behrens* and *Johannes Christoph Fehling*, electing by their counsel not to interfere in the now pending attachments against the Defendants *Henry William Lebrecht Crusius* and *William Von Melle*, respectively, in the Lord Mayor's Court, it is ordered that the Defendants *Henry William Lebrecht Crusius* and *William Von Melle*, respectively, be at liberty, in the name of *Edward Henry Sieveking*, to defend or oppose the attachment of the other, as they may be advised. And, after either or both of the said Defendants, *Henry William Lebrecht Crusius* and *William Von Melle*, shall have obtained judgment in the Lord Mayor's Court on the said attachments, it is ordered that either of them, or the said *Heinrich Behrens* and *Johannes Christoph Fehling*, respectively, be at liberty to apply to this Court as they respectively may be advised, when such further order shall be made as shall be just, all parties consenting to submit to the order of this Court in the matter. And this order is to be without prejudice to any

any claim which the Defendants, *Heinrich Behrens* and *Johannes Christoph Fehling*, may have or set up to the funds in question in this cause."

Reg. Lib. B. 1836. fol. 388.

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In pursuance of the liberty given by the last-mentioned order, *Von Melle* gave notice of trial of his attachment, in the Lord Mayor's Court, for the 14th of *April* 1837; and *Crusius* gave notice, for the same day, of an application to the Recorder, for judgment upon the special case reserved upon his attachment.

On that day the Recorder gave judgment against *Crusius*. *Von Melle* then proceeded to the trial of his attachment; and, it appearing in evidence that, at the date of the attachment, *Sieveking* had not in his hands any money of *Beel* and *Witthauer*, but that he had twenty-three bales of wool belonging to them, subject to a lien of 100*l.* in his own favour, *Von Melle* obtained a verdict and judgment of appraisement as to the bales; and the proper officer of the Lord Mayor's Court having then returned that the bales had been removed (having in fact been sold), so that they could not be appraised according to the custom of the city, a writ of inquiry as to their value was executed before the Recorder and a jury, when they were found to be of the value of 1139*l.* 19*s.* 11*d.*, from which having been deducted 100*l.*, the supposed amount of *Sieveking's* lien, a verdict was found for *Von Melle* against *Sieveking*, for the sum of 1039*l.* 19*s.* 11*d.*; and for that sum judgment was entered up on behalf of *Von Melle* against *Sieveking*, according to the practice of the Lord Mayor's Court.

Sieveking did not attend any of the proceedings taken under the liberty given by the order of the 17th of *March*,

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March, being advised that it would not be proper for him to do so; and it appeared, by an affidavit subsequently made by him, that the amount of his lien exceeded 100*l*.

On the 17th of *April*, *Behrens* and *Fehling* put in their answer.

On the 28th of *July*, *Von Melle* moved, before the Lord Chancellor, that the injunction granted by his Lordship, so far as it restrained execution on the judgment, might be dissolved, or otherwise that the sum of 877*l*. 0*s*. 5*d*., paid into Court by *Sieveking*, might be paid out to him (*Von Melle*) in part satisfaction of his judgment; and, at all events, that he might be at liberty to issue execution out of the Lord Mayor's Court against the Plaintiff or his effects, for the sum of 162*l*. 19*s*. 6*d*., being the difference between the sum of 877*l*. 0*s*. 5*d*., and the sum of 1039*l*. 19*s*. 11*d*.; or that the Court would make such order upon the footing of, and in furtherance of the order of the 17th of *March*, as might be just, as well in relation to the subject matter of the cause, as to the costs of and consequent on the application for the injunction, and the costs of the application upon which the order of the 17th of *March* was made, and of the present application.

Mr. *Jacob* and Mr. *O. Anderdon* appeared in support of the motion.

Mr. *Tinney* and Mr. *Randell* appeared on behalf of *Behrens* and *Fehling*.

Mr. *Richards* and Mr. *Loftus Wigram* appeared on behalf of *Crusius*.

Mr.

Mr. *Wigram* and Mr. *Stinton* appeared on behalf of the Plaintiff.

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The following order was made upon this motion : —

“ His Lordship doth order that it be referred to the Master of the Vacation in attendance, to enquire and state what was due by the Plaintiff, *Edward Henry Sieveking*, in respect of the goods in the pleadings mentioned, at the time of his paying the sum of 877*l.* 0*s.* 5*d.* into the Bank to the credit of this cause, making unto the said Plaintiff all just allowances, and deducting any balance which was due to him from *Henry Diedrich Beel* and *Charles William Witthauer*, in the pleadings named, at the date of the attachment of the said *William Von Melle*, in the Mayor’s Court, in respect of any other dealings. And for that purpose the parties are to produce before the Master, upon oath, all books, papers, and writings,” &c. “and to be examined upon interrogatories, as the said Master shall direct, who, in taking the said accounts, is to make to the parties all just allowances. And it is ordered that the said sum of 877*l.* 0*s.* 5*d.*, cash in the Bank, placed to the credit of this cause, be laid out in the purchase of bank 3 per cent. annuities, in the name and with the privity of the Accountant General of this Court, in trust in this cause. And the said Accountant General is to declare the trust,” &c. “And for that purpose the said Accountant General is to draw,” &c. “And any of the parties are to be at liberty to apply,” &c. “And his Lordship doth reserve the costs of this motion, and of the enquiry hereby directed.”

Reg. Lib. B. 1836. fol. 871.

The suit was afterwards compromised.

1837.

May 4.

BEHRENS v. SIEVEKING.

A plea of proceedings in another Court of competent jurisdiction, must shew not only that the same issue was joined as in the suit in this Court, but that the subject matter was the same, and that the proceedings in the other Court were taken for the same purpose.

THIS was the suit which, in the report of the case of *Sieeking v. Behrens (a)*, has been already mentioned to have been instituted by *Behrens* and *Fehling* against *Sieeking*, on the 24th of *December* 1836.

The same Plaintiffs, at the same time, instituted a similar suit against two persons of the names of *Pauli* and *Jones*, in whose hands monies belonging to *Beel* and *Witthauer* had been attached by *William Von Melle*, and against *Von Melle* himself.

With reference to these monies, a bill of proof had been filed in the Lord Mayor's Court by *Behrens* and *Fehling* against *Von Melle*, upon which proceedings had been taken, which were precisely similar to those taken upon the bill of proof filed by the same parties with reference to the monies attached in the hands of *Sieeking*, and which were attended by the same result, viz. a judgment in favour of *Von Melle*. Both in the suit of *Behrens v. Sieeking*, and in the suit of *Behrens v. Pauli*, the Defendant *Von Melle* put in a plea, stating the proceedings which had taken place in the Lord Mayor's Court, and insisting upon them in bar to the suit in equity. This plea was allowed by the Master of the Rolls in both suits. The argument and judgment at the Rolls upon the plea in *Behrens v. Pauli* are reported in the first volume of *Mr. Keen's Reports. (b)*

In the suit of *Behrens v. Sieeking* (which involved property of a larger amount than the suit of *Behrens v. Pauli*),

(a) p. 581. *suprà*.

(b) p. 456.

Pauli), the Plaintiffs now appealed from his Lordship's decision.

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Mr. *Tinney* and Mr. *Randell*, in support of the appeal.

Mr. *Wigram* and Mr. *O. Anderdon*, in support of the plea.

The LORD CHANCELLOR was of opinion that the plea was not sufficient, in its present state, but he gave leave to the Defendant to amend it, and he also gave leave to the Plaintiffs to amend their bill, as they might have some equitable reason to allege why the Defendant was not to be entitled to the benefit of the proceedings in the Lord Mayor's Court. His Lordship, in giving judgment, said, that in order to support the plea, it was necessary to shew that the proceedings in which the Plaintiffs were alleged to have failed, were taken for the same purpose as the present suit; for, the issue might have been the same, while the object was different; and the circumstance that the matter had been tried, as a matter of evidence, could not be conclusive. The Defendant had to shew that the subject matter was the same; that the right came in question before a court of competent jurisdiction; and that the result was conclusive, so as to bind the judgment of every other court. His Lordship added, that it was in the plea alone that any statement of the bill of proof or of the proceedings taken upon it was to be found; but that the plea left the Court in ignorance upon the question whether the proceedings, which it alleged to have taken place in the Lord Mayor's Court, were conclusive, even in that court. His Lordship thought that the Plaintiff could not have taken issue upon the plea; and that no question was stated in the plea upon which his Lordship could ask for the opinion of the Recorder.

1837.

July 29. The ATTORNEY GENERAL *v.* NETHERCOAT.

If a Defendant is added by amendment after answer, no further amendment of the bill can be made, even as against that Defendant, except upon an application supported in the manner required by the thirteenth order of 1828, as amended in 1831.

IN this case the information was originally filed against the Defendant *Nethercoat* only. After his answer had been put in, the information was amended, by adding several new Defendants, and otherwise.

A motion for leave to amend the information was afterwards made before the Vice-Chancellor. That motion was not supported in the manner required by the thirteenth of the new orders of 1828, as amended in 1831, but no objection was taken upon that ground; and his Honor gave leave to amend within a month after the relators should have seen certain documents which were in the possession of some of the Defendants.

Samuel Marsh, one of the Defendants who had been so added as above mentioned, but not one of the Defendants in whose possession any of the documents were, now moved to discharge the Vice-Chancellor's order.

Mr. Wigram and *Mr. Koe*, supported the motion, and *Mr. Spence* and *Mr. O. Anderdon* opposed it. The grounds upon which it was supported and opposed are not material for the present purpose; for the Lord Chancellor intimated an opinion that the information having been once amended after answer, no further leave to amend could be granted, except upon an application supported in the manner prescribed by the thirteenth order.

Mr. Spence and *Mr. O. Anderdon* admitted that the application to the Vice-Chancellor had not been supported

ported in the manner required by the thirteenth order, inasmuch as there had been no affidavit that the draft of the intended amendments had been previously settled and signed by counsel; but they contended that, as against the Defendants who had been added by the former amendment, of whom *Marsh* was one, the bill was a new record (*a*), and therefore, that the amendment now intended would be a first amendment as to them; and they also urged that the application for leave to amend was made to the Vice-Chancellor, in the present case, upon special circumstances.

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The LORD CHANCELLOR said, that the thirteenth order peremptorily declared, that when a bill had been once amended after answer, no further leave to amend at all should be granted, unless the application for such amendment were supported in the manner prescribed by that order; and that, if it were held that an amendment by adding parties was not an amendment within the meaning of the order, a Plaintiff might always, by adding another Defendant, entirely evade the order. In answer to the observation that the application in the present instance was made upon special circumstances, his Lordship said that it was to applications on special circumstances that that order was intended to apply.

The order was discharged, without prejudice to any subsequent application for leave to amend, which the relators might be advised to make.

(*a*) See *Evans v. Hughes*, over-ruled by the decision in the 5 Sim. 666. which seems to be present case.

1836.

1836.

Nov. 21. 25.

COOKSON v. HANCOCK.

A testator by his will gave 3000*l.* to his brother *B.* for life, with remainder, as to 1000*l.*, to his wife for life; remainder, as to the whole, to his children; he then gave 6000*l.* to his sister *S.* for life, with remainder to her husband for life, remainder to her children; and, after bequeathing 10*l.* a year to each of his two maid servants for their lives, he gave all his real estate, and the residue of his personal estate to his sister *H.* absolutely. By a testamentary paper described as a

codicil to his

will, he left his brother *B.* an equal share of his effects with his sisters, to have the interest for his life, with remainder to his children, subject to a life interest in 1000*l.* to his wife, if living at his death; and his sister *S.* was to have an equal share with his sister *H.* By a subsequent testamentary paper, also described as a codicil, he left his two maid servants 10*l.* a year each for their lives, and nominated a person to act as trustee with the executors named in the will:

Held, upon the effect of all the testamentary papers taken together, that the will, though modified, was not wholly revoked by the first codicil; and that, in lieu of the 6000*l.* legacy given them by the will, *S.* and her children were entitled to one third share of the personal estate, in the same manner and subject to the same limitations as had been expressed by the will with respect to that legacy.

THE will and other testamentary papers, upon the construction of which the question in this cause turned, are stated in Mr. *Keen's* report of the case on the hearing at the Rolls (*a*).

By the decree of the Master of the Rolls it was (among other things) declared that, according to the true construction of the codicils to the will, the residue of the testator's personal estate, subject to annuities of 10*l.* to each of his two maid servants, but not subject to the 3000*l.* and 6000*l.* given by his will, was divisible into three equal shares, and that one of such shares belonged to the Defendants *George Baker* and his wife, and their children, in the same manner as was by the will directed with respect to the 3000*l.*, and that one other of such shares belonged to the children of *Thomas Smith* and *Catherine* his wife (both deceased), in the same manner as was by the will directed as to the 6000*l.*, and that the remaining third share belonged to *Jane Hancock*. The Defendant *Edward Smith*, as executor of his mother *Catherine Smith*, and in that character claiming the whole of her third, appealed against this part of the decree.

Mr.

(*a*) 1 *Keen*, 817.

Mr. *Temple*, Mr. *Wigram*, and Mr. *Bagshawe*, in support of the appeal, contended that the operation of the first codicil was wholly to revoke the legacy of 6000*l.* bequeathed to *Catherine Smith* and her children, and to give to her, in lieu of a life interest in that sum, an absolute interest in one third share of the testator's personal estate.

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HANCOCK.

Sir *C. Wetherell*, Mr. *Swanston*, and Mr. *Purvis*, for the Plaintiff, submitted that the first codicil was to be confined in its effect to the testator's residuary personal estate only, and that it did not revoke or at all affect the legacy of 6000*l.* If that construction, however, should be rejected as inadmissible, they then contended, in support of the decree, that the share of the residue given by the first codicil must be considered as substituted for the legacy given by the will, and subject, by implication, to the same limitation in favour of the children of *Catherine Smith*, after their mother's death, as that legacy had been.

The LORD CHANCELLOR, [after stating the substance of the will and codicils (a) : —]

Nov. 25.

It was observed at the bar that there are only three constructions which can possibly be put upon the first codicil. The first is, that the pecuniary legacies given by the will are not revoked by that codicil, but that the codicil operates only upon the residue by the will bequeathed to *Jane Hancock* ; and that the object of the codicil, therefore, was to leave the sums of 3000*l.* and 6000*l.* exactly as they stood upon the will ; and to declare the brother and the other sister should participate equally with her in the residue. The second is the construction contended for by the Appellant ; namely, that the codicil has the effect of revoking the whole of the

(a) The will was duly attested did not appear whether the testator left any real property.

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provisions of the will, not by any express declaration, but by operating upon the whole of the property of which the will purported to dispose, and so superseding its provisions. The third is the construction which the Master of the Rolls has adopted, that the codicil was only intended to affect the proportions of the estate to be taken by those legatees respectively, and to make that equal which was, by the will, unequal.

The first of these constructions was not insisted upon by the Appellant. The Master of the Rolls decided against it; and it is quite clear that it cannot for a moment be maintained. The expression "effects," used in the codicil, is quite conclusive against holding that the testator was there intending to deal only with that which he had described in the will as the residue of his personal estate. Such a construction, besides, would wholly defeat the object of the codicil, which is manifestly equality—equality, not in reference to any particular portion of the assets, but in reference to the effects generally, that is, the entire personal estate. The consequence of preserving the bequests contained in the will would be to produce gross inequality among the legatees; *George* would not be placed on an equality with his sisters, or *Catherine* with *Jane*; but they would each take the property in very different proportions, and *Jane* would be entitled to much the smallest share. As this construction, however, has not been insisted upon, it is needless to consider it further.

Upon the second construction proposed, the Master of the Rolls said he had no right to look at the amount of the estate otherwise than as it appeared in the testamentary papers. If, however, it appears from those papers, that the testator knew or believed the estate to be of a certain amount, that knowledge, so expressed, may very properly be called in aid of the construction.

Now,

Now, it is clear from the codicil, that the testator considered the residue to be greater than the 6000*l.* bequeathed to his sister *Catherine*; for he says that *Catherine* shall have an equal share with *Jane*; an expression which he would hardly have employed, unless he had conceived that the residue previously given to *Jane* exceeded the amount of the legacy to *Catherine*. So, again, there is no direct gift in terms to *Jane* at all; the testator assumes *Jane* to be already in possession of something; and the object of the codicil is to take a portion of that from her, for the purpose of raising *Jane's* sister to an equality with *Jane*.

If the codicil has the effect contended for by the Appellant, it entirely revokes the will. But it revokes the will, not by any declared intention as to the legacies of 6000*l.* and 3000*l.*, but by dealing with the property which is the subject matter of the dispositions; and, if the Appellant's construction be correct, it must have operated as much on the annuities given to the two maid servants as on those money legacies. According to that view, the testator, when he executed the first codicil, intended to make an entirely new disposition, which should embrace the whole of his property. If that were the case, he has certainly taken a very singular way of accomplishing his object. Why should he not rather have at once proceeded to make a new will? Instead of that, however, he describes each of these testamentary papers as a codicil to his will; assuming, therefore, that the will was a subsisting instrument; and in neither of them is there any gift of his estate, in terms. And yet, according to the Appellant's argument, the will was virtually revoked for every purpose except the appointment of executors.

It was argued that the repetition, in the second codicil, of the bequest for the benefit of the two maid servants, shewed

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shewed an impression in the testator's mind, that he had, by the previous codicil, revoked all the legacies given by the will, and, among others, the annuities given to the maid servants. That circumstance may indeed prove, that in *November* 1828 he was afraid he might have done so; but it rather tends to shew that in *January* 1827 he had not intended so to do: and the reference to the two executors named in his will and the addition of a third prove that he then considered the will to be a subsisting instrument. If he had intended to revoke the whole of his will, he would have given his estate in equal shares, and not have brought *Catherine* up to *Jane*, and *George* up to them both. But, if his object was not to alter the disposition by his will, otherwise than by making the division equal, the expressions used in his first codicil are all explained. They are imperfect expressions for either purpose; but they are consistent with the third construction, and inconsistent with the second.

It was further said that the settlement of *George's* share shews that *Catherine* was to take her share absolutely. Had the settlement of the 6000*l.* and of the 3000*l.* been the same, the observation would have had weight; but, as the case is, the fact favours the third construction, because it proves that the testator had in his mind, and intended to a certain extent to maintain the provisions of the will, even as to quantity and proportion; namely, by giving to *George's* widow the interest of 1000*l.* only. Had he devoted to *George's* family one third of the residue simply, his widow might have claimed one third of the income of the substituted provision, as she had one third of the income of the 3000*l.* As to her, therefore, the testator says she shall not participate in the increase; a circumstance leading to the construction that increase of the shares of *George* and *Catherine*, and not a new disposition, was the object of the codicil.

Upon

Upon these grounds, I am of opinion that the third construction, that which has been adopted by the Master of the Rolls, is the true construction of these testamentary papers. The decree must therefore be affirmed; but, as the question is one of difficulty, and created by the testator himself, I think that the appeal was not censurable, and that the costs of it should be added to the costs of the cause.

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COOKSON
v.
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SAWYER v. BIRCHMORE.

1837.
Jan. 16, 17.
August 15.

THE facts of this case are stated in Mr. Keen's report of it, upon the hearing at the Rolls. (a)

The Master of the Rolls having decided that, upon the evidence in the cause, the Plaintiffs must be assumed to have been cognizant of the prior suit of *Smith v. Stone*, in which the personal estate of the intestate *James Clear* had been distributed under the decree of the Court, and that the proceedings in that suit, therefore, constituted a bar to their present claim, an appeal was brought against his Lordship's decision.

Sir *W. Horne* and Mr. *Moore*, for the appeal.

Mr. *Wigram* and Mr. *Lynch*, *contrâ*.

With respect to the principles which govern Courts of Equity, in directing monies to be refunded, where such monies have been paid, under an order or decree in a cause, to persons who are subsequently discovered not to have been entitled, the same authorities were referred to as had been referred to in the Court below. Upon the

The circumstance that an intestate's personal estate has been distributed, in a suit, among the persons appearing to be his sole next of kin, does not necessarily preclude other persons having an equal title to that character, from afterwards instituting a new suit against the next of kin who have been thus overpaid, and compelling them to refund a proportion of their shares.

(a) 1 *Keen*, 391.

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the effect of laches and acquiescence, *Goodman v. Sayers* (a) and *Govett v. Richmond* (b) were cited.

The LORD CHANCELLOR in giving judgment, entered into a minute and elaborate review of the evidence in the cause, and expressed an opinion that, upon the result of that evidence, a knowledge of the pendency of the former suit was not conclusively brought home to any of the Plaintiffs. His Lordship then proceeded as follows: —

In this state of circumstances, I think it would be very unsafe to conclude the claim of the Plaintiffs, upon such evidence, without giving them an opportunity of further inquiry. I therefore think that the decree for dismissal should be reversed; and that it should be referred to the Master to inquire, whether the Plaintiffs or those whom they represent, or any of them, are any of the next of kin of the intestate *James Clear*; and if he shall find that they are such next of kin, then to inquire whether they, or any and which of them, had any, and what notice of the suit for distributing the estate of the said *James Clear*, and of the proceedings therein; with liberty to state special circumstances: costs and further directions to be reserved.

If the latter inquiry should be answered in the negative, there will be no obstacle to the Plaintiffs' demand. It is, therefore, unnecessary for me at present to observe upon the other facts of the case, particularly upon the circumstance of the personal representative, and some of the next of kin co-operating, as it is alleged, in getting a report, excluding some, of whose claim, at least, all had ample notice. Should it become necessary to consider this point, the Master's report will probably furnish materials which may considerably affect the question.

(a) 2 J. & W. 249.

(b) 7 Sim. 1.

1897.

The ATTORNEY GENERAL v. ASPINALL.

Jan. 9, 10.
Nov. 11.

THE substance of the supplemental information in this suit is stated by Mr. Keen in his report of the case upon the argument of the demurrer at the Rolls. (a) It is also shortly recapitulated in the Lord Chancellor's judgment.

The MASTER of the ROLLS having made an order allowing the demurrer, the Attorney General appealed from his Lordship's order.

Upon the opening of the petition of appeal, a preliminary question was made as to which party had the right to begin. The Lord Chancellor decided, that the Appellant was entitled to begin.

The Attorney General, the Solicitor General, Mr. Kendersley, and Mr. Booth, in support of the appeal.

(a) 1 Keen, 515.

passing of the act, but before the election of the new council, and having for its object to endow the churches and chapels of the established church within the borough with fixed stipends, for their several ministers, is not an appropriation warranted by the Act, and is therefore a breach of trust.

The ordinary jurisdiction of the Court over such a transaction, by means of an information seeking to have the funds recalled, and the appropriation rescinded, as being a breach of trust, is not ousted by the special remedies provided in certain cases by the 97th section of the Municipal Corporation Act.

Seem, Those remedies would not be applicable in any case to a transaction of this description.

Where property is devoted to trusts which are to arise at a future time, and be exercised by trustees who are not yet in *esse*, any intermediate act done by the holders of such property, inconsistent with the security of the property, or the performance of the trusts when they shall arise, will be set aside; and if the trusts are of a public nature, the Court will entertain this jurisdiction upon an information by the Attorney General, notwithstanding that the trustees, after they have come into *esse*, themselves decline to interfere.

On an appeal from an order allowing a demurrer to the whole bill, the Plaintiff is entitled to begin.

The funds belonging to the municipal corporations of boroughs named in schedules A. and B. of the 6 W. 4. c. 76. (the Municipal Corporation Act) became, upon the passing of that Act, subject to certain public trusts, to be exercised by the new Council, only in the manner and for the purposes prescribed by the Act.

An appropriation of such funds, made by the old corporation, after the

Mr.

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Mr. Pemberton, Mr. Wigram, and Mr. Turner, in support of the demurrer.

The arguments relied upon on both sides were substantially the same as those which had been employed in the court below, first upon the motion in the original suit, and afterwards upon the demurrer to the supplemental suit, and which have been already fully reported. (a) The most important of the topics urged in behalf of the Respondents, are stated and considered in the judgment. Upon the question of jurisdiction, the following authorities were referred to, in addition to those which had been cited at the Rolls; *Amy Townsend's Case* (b), *Millar v. Taylor* (c), *Beckford v. Hood* (d), *Doe dem. The Bishop of Rochester v. Bridges* (e) and the cases, under the *French Convention Act*, of *Hill v. Reedon* (g), and *Lloyd v. Lord Trimlestown*. (h)

Nov. 11.

The LORD CHANCELLOR.

The demurrer in this case is to a supplemental information, filed against parties who were not parties to the original information, but who derive title through the Defendants to the original information, by deeds executed subsequently to the institution of the suit.

The original information, filed after the passing of the Municipal Corporation Act, sought to restrain the corporation of *Liverpool*, as it existed before that act came into operation, from appropriating certain property

(a) See *The Attorney General v. The Mayor of Liverpool*, 1 *Mylne & Craig*, 171.; *The Attorney General v. Aspinall*, 1 *Keen*, 513.

(b) *Plowd.* 111.

(c) 4 *Burr.* 3303.

(d) 7 *T. R.* 620.

(e) 1 *B. & Ad.* 847.

(g) 2 *Russ.* 608.

(h) 4 *Sim.* 296. See also *Parry v. Owen*, 3 *Atk.* 740.; *Sheriff v. Coates*, 1 *Russ. & Mylne*, 159.; 1 *Sim.* 499.

perty of the corporation to purposes alleged to be foreign to the objects of the Act.

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The demurring Defendants claim under deeds executed by the corporation after the institution of the suit, and immediately before the provisions of that Act came into operation. These Defendants, therefore, though not parties to the original information, claim under those who were such parties, and derive from them a title created *pendente lite*. I observe this state of the record, because I find observations made upon the omission, in the supplemental information, of certain allegations contained in the original information. I do not, however, pursue the question further, but proceed to consider what is alleged in the supplemental information.

The supplemental information states, in the usual way, the filing of the original information, and proceeds to recite some, if not all, of its allegations; and, as to the greater part of them, it recites them with this addition, "as the fact was and is," — words which are usually introduced for the purpose of putting in issue facts alleged in the recited proceeding, and the introduction of which makes the recital itself as much an allegation of the facts stated in it, as if those facts had been substantively alleged. I proceed, therefore, to consider the allegations of the supplemental information, considering every fact so alleged as forming part of it, and, therefore, admitted by the demurrer to be true.

The information commences by stating the possession, by the corporation, of a large real and personal estate, and that the corporation was indebted in divers sums of money, to divers persons, to a very considerable amount in the whole.

It

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It then states that the corporation were patrons of certain churches in *Liverpool*, the ministers of which had theretofore received stipends or allowances, amounting in the whole to 5695*l.* per annum; that is to say,

1080*l.* under endowments by certain acts of parliament,

510*l.* out of pew rents,

100*l.* payable out of the funds of the corporation,

450*l.* by rates leviable under acts of parliament,

1040*l.* gratuitously paid out of parish rates, and

2515*l.* which had been gratuitously paid out of the funds of the corporation.

Of this last-mentioned sum of 2515*l.*, the sum of 1865*l.* had been so paid for more than seven years before the 5th of *June* 1835, and was therefore protected by the 68th section of the act; and the remaining 650*l.* had been paid for less than seven years. The information then states that the corporation were about to raise a sum of 105,000*l.* upon the security of their corporation property, and to vest the same in trustees, upon trust to pay 3665*l.* of the interest to the incumbents of the churches in the town; and that, for this purpose, they proposed to charge certain property not before liable to such payments.

The supplemental information then recites certain charges contained in the original information, but without the allegation "as the fact was and is;" and, among others, that the debt due by the corporation amounted to the sum of 792,000*l.*, and that there was reason to expect that the income of the corporation would not be sufficient to defray the charges imposed upon it by the Act, and that a rate would therefore be necessary.

It

It is unnecessary to decide, whether these charges ought to be considered as part of the supplemental information, because there is a statement clearly forming part of it, which is, I think, equivalent, for the purpose of the demurrer; namely, the allegation that the corporation was indebted before the execution of the deeds in question, to a considerable amount.

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The supplemental information then states, as supplemental matter, that the corporation had borrowed 63,440*l.* upon mortgage of part of their property, under a deed of the 21st of *December* 1835, and had paid that sum, together with 41,560*l.*, making in all 105,000*l.*, to certain of the new Defendants, as trustees, upon trust, out of the interest, to pay to sixteen clergymen certain stipends, amounting together to 4000*l.*, per annum, which provision, it was stipulated, should be accepted by the ministers in lieu of the rates payable under the acts of parliament, and of the allowances made to them for the preceding seven years; and the surplus income, and any portion forfeited by the ministers not complying with the condition, were to be paid to the Treasurer of the borough fund. It then states, that the trustees had notice of the facts stated, and had undertaken to restore the fund, if the appropriation could not be supported: that the members of the corporation, under the Municipal Corporation Act, and the Treasurer, came into office on the 26th of *December* 1835; and that the council had applied for the repayment of the money, but refused to take any further step to procure such repayment, without the direction and sanction of the Court.

The ministers are made Defendants, and the information prays that the appropriation may be declared to be unlawful and invalid, and the 105,000*l.* restored, and the income paid to the Treasurer.

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To this information the trustees and the ministers demurred, generally, and the demurrer was allowed by the Master of the Rolls.

If the property in question be subject to any public trust, and if the appropriation complained of be not consistent with such trust, but for purposes foreign to it, and if there be not, in the Municipal Corporation Act, any provision taking from the Court its ordinary jurisdiction in such cases, then it will follow that the Attorney-General has, under the circumstances stated, a right to file the information, and to pray that the fund may be recalled, secured, and applied for the public, or in other words, charitable purposes, to which it is by the Act devoted.

I will consider these three questions in their order.

1. First, then, is the property in question, according to the statement in the information, subject to any trust?

It is immaterial to consider what was the power of the corporation over this and their other property, before the passing of the Municipal Corporation Act. That Act passed on the 9th of *September* 1835, and the new officers were to come into office on the 9th of *November* in that year; but, by an order in council, that time was enlarged to the 26th of *December* following.

By the 1st section of the act, all laws, statutes, and usages, charters, grants, and letters patent inconsistent with, or contrary to the provisions of the Act, are repealed and annulled. The power of the corporation, as it existed prior to the passing of the Act, depended upon the law and usage then in force. So far, therefore, as such law and usage authorised an exercise of such power

power inconsistent with, or contrary to the provisions of the Act, it was, from the time of passing that Act, annulled.

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The 92nd section directs, that after the election of a Treasurer, which was to take place on the 9th of *November*, though afterwards postponed by Order in Council till the 26th of *December*, all the income of all the property belonging or payable to any of the corporations named in schedules A and B, that is, so belonging or payable when the Act passed, was to be paid to the Treasurer; and the fund so created, subject to the payment of the debts owing by the corporation at the time when the Act passed, or of so much as the council, that is, the new council, should think it expedient to redeem, and to the interest of such debt, was to be applied in payment of the salaries of certain officers, expenses of borough elections, expenses of borough sessions and prosecutions, gaols, and corporate buildings, police, and all other expenses incident to carrying the act into effect: and in case the borough fund should be more than sufficient for those purposes, then the surplus was to be applied, under the direction of the council, that is, of the new council, for the public benefit of the inhabitants and improvement of the borough. The reduction or remission of any tolls or dues charged with, or subject to the payment of any debts, is then prohibited, so long as such debt remains unpaid, unless a majority of the creditors shall consent; and in case the borough fund shall not be sufficient for all the purposes enumerated, a power is given to the council to raise the deficiency by a borough rate, in the nature of a county rate.

It is to be observed upon this section, that no power is given to touch the principal of any part of the corporate property. The income alone constitutes the

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borough fund. The whole of the income is, in the first place, subjected to the payment of the corporation debts, and afterwards to other purposes, all of them of a public nature, and in which the inhabitants at large have a direct interest, not only as entitled to participate in the benefit to arise from the execution of such purposes, but because the deficiency is to be raised upon them by a rate.

The 94th section restrains the new council from selling, mortgaging, or alienating any lands, tenements, or hereditaments of the corporation, except in cases of contracts made before the 5th of *June*, and from leasing the same, except upon certain prescribed terms, without the consent of the Lords of the Treasury.

This clause not only regulated, for the future, the power of the corporation over its lands, tenements, and hereditaments, but invalidated any contracts inconsistent with such regulations, made after the 5th of *June*: and this could only be done by a distinct enactment; for, whatever might be the effect in equity of the provisions of the act upon any contracts of the corporation, entered into after the act passed, and before the election of the new officers, nothing but a distinct enactment could affect the power exercised by the corporation prior to the passing of the act.

This, and the 95th and 96th sections are confined to lands, tenements, and hereditaments; and there does not appear to be any provision respecting any appropriation of any other property of the corporation, made prior to the passing of the act, except those contained in the ninety-seventh section. That section is most important to be considered, upon two grounds; first, with reference to the evidence which it affords of the intention
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of the legislature, as to such appropriations of other property, besides lands, tenements, and hereditaments; and secondly, with reference to the question raised for the Defendants, that the jurisdiction of this Court is ousted, by reason of that clause having provided another remedy for the cause of complaint raised by this information. I propose at present to consider only the first of these points.

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As it was thought right that the new council should have a power of calling in question acts relative to the corporate property, carried into effect before the period of their election, it was absolutely necessary to give them a distinct legislative authority for this purpose; because, in the first place, there would otherwise be no means of impeaching any acts of the corporation done prior to the passing of the Act of parliament, however improper; and secondly, because, the identity of the corporation continuing, notwithstanding the alterations effected by the Act, any such attempt, on the part of the new council, would be an attempt by the corporation to impeach its own act. Some such provision was therefore absolutely necessary; and the obvious intention of that clause was to subject to revision all acts of the corporation after the 5th of *June*, effecting any disposition of the corporate property; and for that purpose (confining myself to the words which can alone be thought applicable to the present case) the 97th section makes it lawful for the council to call in question all divisions and appropriations of the monies, goods, and valuable securities, or any part of the real or personal estate, of which, on or before the 5th of *June*, the body corporate was possessed, made between the 5th of *June* and the declaration of the election; and for that purpose, if it should appear to the council that such division or appropriation was collusively made,

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for no consideration, or for an inadequate consideration, to institute the proceedings prescribed.

The duty imposed upon the jury is to ascertain the value of the "premises," and the "consideration" given for the appropriation thereof; and it is enacted, that if the jury shall find that no consideration, or a consideration less than that which they shall find to be the value *which ought therefore* to have been given, had been collusively given, or contracted to be given, by the terms of the appropriation, the party to such appropriation was to have the option of restoring the premises and receiving back his consideration, or of making up the consideration to what the jury might find ought of right to have been given. There is some obscurity in part of this clause: the expressions used in the directions as to summoning the jury, are, it was contended, to be confined to lands, tenements, and hereditaments. Upon that I give no opinion; but supposing them to apply to appropriations of the personal, as well as of the real property of the corporation, the intention to be inferred from the whole clause obviously is to secure the corporations, and therefore the public, from all appropriations of property, after the 5th of *June*, made collusively for less than the full value; the word "collusively" not being used in a bad sense, but certainly including the case of persons taking part of the corporation property for their own benefit, with a knowledge of the circumstances of the property, and of the question which would arise as to the right of the corporation to make such alienation.

In my opinion, the 92nd section did not require the aid of the others, and particularly of the 97th section; but, taking them all together, I cannot doubt that a clear trust was created, by this Act, for public,
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and therefore, in the legal sense of the term, charitable purposes, of all the property belonging to the corporation at the time of the passing of the Act; and that the corporation in its former state, holding, as it did, the corporate property until the election of the new council and Treasurer, were in the situation of trustees for these purposes, subject to the restrictions specifically imposed by the Act, and subject to the general obligations and duties of persons in whom such property is vested.

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That the application of the income of the property to the particular purposes specified in the Act was not to commence till a future time, namely, the election of the council and the appointment of a Treasurer, cannot affect the question. If the income of a fund be devoted to a trust from a particular day not yet arrived, the party in whom such fund is vested is bound to hold and manage it so as to have the fund applicable to such purposes at that time, whatever may become of the intermediate profits.

Upon the first point, therefore, I am clearly of opinion that from the time when the Municipal Corporation Act passed, the corporate property was trust property: and, upon this point, I have the satisfaction of thinking that no material difference exists between my opinion and that of the Master of the Rolls; for in the notes of his judgment, I find it stated that he expressed such to be his view of this part of the case.

2. Assuming, therefore, that the corporation property was, on the 21st of *December* 1835, trust property, vested for the time in the corporation as it then existed, by reason of the postponement of the time for the election of the council and the appointment of a Treasurer, but awaiting the arrival of that time in order to

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be applicable to the several public purposes prescribed by the Act, — the second question is, whether the transaction relative to the 105,000*l.*, as stated in the supplemental information, was consistent with the existence of such a trust, or conformable to the provisions of the act.

In the first place, it consisted, in part, of a mortgage of the property of the corporation, which the new council are by the 94th section prohibited from making; but, principally, it was an appropriation of a portion of the income of the corporate property for purposes, which, however laudable in themselves and beneficial to the interests of the inhabitants, cannot, according to the statements in the information, be said to be consistent with the trusts to which the property was by the Act devoted, or conformable to the provisions of the Act. Of the amount of the income of the corporate property, or of the debt due by the corporation, or of the amount of the several payments by the Act directed to be paid out of the income, the information does not state any thing: but the debt is stated to be large; and, by the Act, the whole of the income is made primarily liable to pay the interest of the debt, and, at the discretion of the new council, to the payment of the principal, and, next, in making the several other payments directed. Whether there will be any surplus of such income, is not stated; and that, probably, must depend upon the discretion to be exercised by the new council as to the payment of the principal of the debt out of the income of the property — a discretion which, by the appropriation in question, is taken away to the extent of the interest of the 105,000*l.*

Again, although there is no statement that there will not be any surplus income, after payment of the prescribed expenses, yet there is no statement that there will

will be any such surplus; and the whole income being primarily liable to those payments, the inhabitants, and the Attorney-General on their behalf, may justly complain of a diversion of any part of the income, whilst those objects remain unprovided for. A trustee cannot justify an application of part of a trust fund to other purposes, by suggesting that enough will remain of the fund to answer the purposes of the trust.

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The appropriation in question has not been defended upon the ground of its being an appropriation for a full consideration, under the 97th section. The appropriations referred to by that section seem to be dispositions for which an equivalent in money or other property was, or was pretended, to be received by the corporation, and not appropriations the consideration for which were services or benefits to the public. But, even if that were so, the services or benefits reserved by the arrangement with the clergy could not be supported upon this ground, as the new provisions exceed what they could claim without it; and although the individual ministers give up the right to receive certain stipends raiseable by rates, the sums so given up are not of equal amount to the sums secured by the arrangement; and the amount of rates so given up is not receivable by the corporation in lieu of the interest of the 105,000*l.* appropriated in exchange for them; nor are they, it is alleged, payable by the same persons who will have to pay the borough rate, in case of a deficiency of the borough fund.

A case may certainly be supposed of the income of the corporate property being so large, that after providing for the payment of the interest of the debt due by the corporation, and so much, if any, of the principal as the council may think it advisable to pay, and after supplying

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supplying means of defraying the expenses of all the other services directed by the 92d section to be provided for, a surplus would remain, applicable, under the provisions of that section, for the public benefit of the inhabitants, and improvement of the borough; and, under such circumstances, the appropriation in question might be the most proper. But at whose discretion, and under whose direction, was this application of the surplus to be so made? Not of the corporation, as it existed before the election of the council, and before such surplus could be ascertained; but of the new council, and after the existence of a surplus should have been proved by all the prior objects having been previously provided for.

It must also be observed, that the only payments to be made, out of the income of the borough fund, to the ministers of any church or chapel are, by the 68th section, such as shall have been paid for seven years before the 5th of *June* 1835. Such is the limit of the trust for this purpose, declared by the Act. It cannot be consistent with such declaration of trust to appropriate for the ministers, not only what they had received for seven years before the 5th of *June* 1835, but also the amount of income which had commenced within that period.

So, by the 139th section, all advowsons and church property belonging to the corporation are directed to be sold, and the proceeds invested, and the income paid to the Treasurer, as part of the borough fund. How inconsistent with the object and spirit of that clause is the appropriation of corporate property, not in the purchase of advowsons, which might therefore be received back upon the sale as directed, but in adding to the provision for the ministers of the churches, when the money so expended, though the value of the advowsons might be in

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some degree increased, could not, upon the sale, be in any considerable degree received back. And yet this was one of the grounds upon which the transaction was defended at the bar : it was stated to be merely an application of one part of the property in augmentation of another part.

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Upon the second head, therefore, I am also of opinion that the facts stated upon the information constitute a case which entitles the Attorney-General, on behalf of the inhabitants, to demand the interference of this Court, unless its jurisdiction be taken away by the Act of Parliament.

3. Upon this third point, I am happy to find the Master of the Rolls concurring in the opinion I have formed, and stating that the jurisdiction of this Court is not excluded by the 97th section, if a proper case for relief be made. The argument in support of the proposition, that the jurisdiction of this Court is taken away, rests entirely upon the 97th section, which, in the cases there specified, authorises and enables the new council to institute certain proceedings, and to submit the matter in dispute to a jury. It is argued, that this clause gives a new right, and prescribes the remedy ; that the right exists only in the remedy ; and that no other course of proceeding but that prescribed can be resorted to. This may be true, as to transactions between the 5th of *June* and the 9th of *September*, the day when the Act passed ; because, at that time, there was no trust. But, if it be true, as seems to be universally admitted, that from the passing of the Act, a trust existed, such trust had all its legal consequences, and the *cestui que trust* were entitled to all their legal remedies.

The argument assumes that the machinery provided by the 97th section applies to the case in question, and

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is not confined to alienations of lands, tenements, and hereditaments for valuable consideration; for, if it be so confined, then the whole foundation of the argument fails. Supposing, however, that the new council had, under this clause, the power of bringing the case in question before a jury, it would be indeed a new remedy; but the right cannot be said to consist in the remedy, inasmuch as the creation of the trust of itself subjected the property to all the other remedies applicable to trusts; and, if this 97th section had not been in the Act at all, the jurisdiction of the Court could not have been disputed; a circumstance which proves that the right does not exist only in the remedy, but that the remedy, if applicable to this case, is afforded merely as another and additional means of enforcing the right.

The jurisdiction of this Court cannot be taken away by another jurisdiction having cognizance given to it of the same matter. The case of *Beckford v. Hood* (a) was well cited in support of this proposition. It was there decided that the penalties given for the infringement of a copyright do not deprive the party entitled to the copyright of the ordinary remedies for an infringement of his right, although the same Act which gave the right, gave also another remedy. Besides, in this case, the remedy is not given to the same person; and the argument of the Defendants is that a summary remedy given to the council is to deprive the inhabitants and the Attorney-General, on their behalf, of a title to assert their rights, and secure their interests, by information.

Upon this third point, therefore, I am of opinion that the jurisdiction of this Court attached upon the property
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(a) 7 T. R. 620.

in question the moment it became trust property; and that there is nothing in the Act to deprive this Court of such its jurisdiction.

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But then it is said, assuming that the property is subject to a public trust, and that this Court has jurisdiction, there is not, upon the face of the supplemental information, such a case stated as makes it proper for the Court to interfere. I have already considered this part of the case in observing upon the second point; but I again advert to it, for the purpose of making some observations upon the points urged in argument in support of the proposition.

It has been said that the corporate property became affected by a trust, to some extent only; and that this trust was not intended, under all circumstances whatever, to prevent the old governing body from alienating or appropriating the property, the income of which, if the property was not alienated or appropriated, would have to form part of the borough fund; and that they were not precluded from a fair application of the corporate property for the benefit of the inhabitants; and that it did not appear that the appropriation in question was not an application of that description.

I cannot adopt this construction of the Act, or follow this reasoning. The trusts, if created and declared by the Act, are distinctly specified; and, if so, it is contrary to the very nature of a trust, that, unless specifically given, any right to defeat the trusts should exist in the party who happens to be the depository of the trust property. That would be the rule by which the control of his legal powers by this Court would be regulated. What other rule or limit can be adopted? If the old governing body had the right of alienating or appropriating

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prising property which would otherwise become subject to the trust, why may they not so alienate or appropriate the whole of it? If they might, at their discretion, reduce the trust fund, why might they not destroy it?

That the new governing body could not so deal with the trust property is admitted. Can it then be supposed that the legislature intended that the old governing body, of which it evinces so much jealousy, should have a power which it denied to the new governing body of its own creation? In the hands of the new council the capital was to be unalienable, and the whole income subject to certain public trusts: but until such council can be appointed, the capital necessarily remains in the legal possession of the old governing body. Could it have been intended, that, during that interval, the old governing body should have the right to alienate the capital, and thereby defeat the trusts of its future income? Were they not trustees, during the interval, for the trusts declared by the Act? If all the income of a specified capital be, by any will or deed, directed, after a certain day or a certain event, to be applied to certain trusts, whether of a public or private nature, would not this Court protect that capital in whosoever's hands it might be vested, and whatever might become of the intermediate interest? The creation of the future trust of itself restricts the exercise of any former power, inconsistent with the security of the fund or performance of the trust, unless the Act itself permits the exercise of it.

It is said that the 97th section impliedly gives such permission, inasmuch as it assumes that the old governing body may sell or appropriate, for a full valuable consideration. This clause has unfortunately mixed up, in one enactment, two periods, the circumstances of which

which are essentially different, namely, the period between the 5th of *June* and the day of the passing of the act—an interval during which the power of the old governing body was absolute, and therefore required an enactment to correct any abuse of it committed in contemplation of the Act then in progress—and the period between the passing of the Act and the election of the council and appointment of the Treasurer, during which, the trust having been created, no such absolute power existed, but a summary remedy against any improper act was desirable.

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For the purpose of my present consideration, however, it is sufficient to observe, that the transaction stated in this information, if within the remedy provided by that clause at all, is not one intended to be protected by it, inasmuch as it cannot be said, according to the facts stated, to be an appropriation for a full consideration; and, if that clause gave to the old governing body any power of alienation or appropriation after the Act passed, such power must be limited to cases in which the full value was received in return, in money or property, so as to leave, therefore, the same amount applicable to the purposes of the trusts. To say that the old governing body were not precluded from a fair application of the corporate property for the benefit of the inhabitants, and that it did not appear that the appropriation in question was not an application of that description, appears to me to be the same proposition in other terms. If the old corporation were bound by the trust, they had no right to exercise that discretion; and I have before observed, that, by the terms of the Act of Parliament, such discretion applied only to the surplus, after all the specified trusts were provided for, and was given to the new council only; and that it was not, in any case, to apply to any part of the capital of the corporate

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porate property, but to the surplus of the annual income only, after providing for all the specified purposes.

Another reason why it is said that this Court ought not to exercise its jurisdiction, is drawn from the remedy, given by the 97th section, to the new council against the acts of the old governing body, and the power given to the Crown, by an Order in Council, to order that such acts shall not be called in question under the provisions of the Municipal Corporation Act.

This argument assumes that the case stated in the information is within the 97th section; and, admitting that the jurisdiction of this Court is not taken away by the provisions of that section, it proceeds upon the ground that the remedy provided by that section ought to have been resorted to. To this it appears to me to be a sufficient answer to say, that the party who alone could exercise the power given by that section and the party filing this information are not the same; and that I can see no principle upon which I could deny to any one a right of suing to which he would otherwise be entitled, because another party, over whom he has no control, declines to prosecute a mode of proceeding open to him alone, and which I may think preferable.

I must observe, also, that the power of the Crown in Council, to protect acts of the old governing body from being questioned, is confined in terms to their being called in question under the provisions of the act. Not only does the section not protect them from being called in question in any other manner, but the words "under the provisions of this act," twice repeated, lead strongly to the conclusion, that they were introduced with the design of guarding against any inference that any other proceedings were to be affected by the Order in Council.

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The Order in Council is not to give validity to the act complained of, but only to protect it from being called in question by the summary process given by the same section.

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I quite agree with the Master of the Rolls, that the 97th section does not take away the jurisdiction of this Court: but I cannot think that the giving this summary remedy to another body, which refuses to exercise it, ought to induce this Court to refuse to exercise such jurisdiction — I say to a body which refuses to exercise it, because such is the statement in the information, which I must take for the present purpose to be true. The charge in the supplemental information is that the new council “have been advised and admit that the appropriation is invalid, and that they are desirous that the 105,000*l.* should be repaid by the trustees thereof, and that they have applied to them to repay the same, but refuse to take any further steps to procure the repayment thereof without the direction and sanction of the Court.”

It has been said that the fair inference from the language of this charge is that the town council approve of the appropriation. I cannot so understand it; nor do I feel at liberty, upon a demurrer, to assume that such is the case, against the plain language of the charge. Supposing, however, that the fact were so, and were so charged, I cannot think that such opinion or such conduct of the town council would deprive the Attorney-General of the right to file this information, according to the facts stated in it. If there be a clear surplus of the borough fund, constituted as by the Act it is, of the income only of the corporate property, an appropriation of such surplus, for the purposes intended to be effected by the transaction in question, may be the most beneficial

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application of it for the benefit of the inhabitants, and, therefore, the most proper to be adopted. But such is not the case stated in this information; and, beyond the power of applying such surplus, the town council itself has no power or discretion given to it. The approbation of the town council, therefore, if given, and if alleged, could not sanction the transaction stated in the information.

I have considered this case with the greatest care and attention. This, the amount of the property at stake, and the opinion expressed by the Master of the Rolls upon those parts of the case which led to his decision, though he agrees with me in the most important points, demanded of me. I purposely avoid giving any opinion upon the transaction, beyond the statement upon the supplemental information. But upon that statement, and with reference to the provisions of the Municipal Corporation Act, I cannot come to the conclusion that the case is one in which this Court ought to refuse to entertain its admitted jurisdiction.

I am, therefore, of opinion that the demurrer ought to have been over-ruled. (a)

Judgment reversed.

(a) This judgment was much relied upon in an analogous case, very recently before the Vice-Chancellor, on demurrer, *The Attorney-General v. Wilson* (Nov. 29. 1837), relative to an appropriation of funds belonging to the corporation of *Leeds*, in which His Honor expressed his

concurrence in the principles laid down by the Lord Chancellor in *The Attorney-General v. Aspinall*, with respect to the construction of the Municipal Corporation Act, and, mainly upon the authority of that case, over-ruled the demurrer.

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LOCKE v. COLMAN.

June 22.
Nov. 6.

THIS case is fully reported, upon the appeal, in the first volume of *Mylne & Craig's Reports*, p. 423.

According to the custom of descent in the manor of *Taunton Deane*, a surviving sister is not entitled to inherit in preference to the son of a deceased brother's son.

The Lord Chancellor having afterwards ordered a second trial (a) of the issue which he had directed for the purpose of trying the alleged custom with respect to the descent of lands within the manor of *Taunton Deane*, a verdict was again found, upon that second trial, in favour of the Defendant. The Plaintiff thereupon moved before the Lord Chancellor for a new trial. The effect of the evidence before the jury is stated and considered in his Lordship's judgment.

The LORD CHANCELLOR.

Nov. 6.

This was an application for a new trial after two verdicts for the Defendant. I directed the last new trial, not because I was dissatisfied with the verdict of the jury, but principally because I thought it probable that the effect of another trial might be to produce further information upon a point which appeared to be involved in much obscurity, and therefore, thought it unreasonable to conclude the title to the property by one trial; particularly as the result of this case will probably operate much upon the establishment of a custom which regulates the descent of property within a large district. I also thought that the case had been left to the jury with rather too strong a leaning against the custom,

(a) p. 42. *supra*.

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custom, as asserted by the Plaintiff, not upon the evidence, but upon the supposed presumption in favour of the common law heir.

I have now to consider whether there be grounds for sending the case to a third trial.

I have very carefully considered the evidence as reported to me by the learned Judge, and have examined all the documents referred to; and I have no hesitation in approving the finding of the jury.

The question is, whether, by the custom of the manor of *Taunton Deane*, a sister succeeds in preference to the son of a deceased brother.

The evidence consists of reputation as to the custom, and of instances in which the succession, under these circumstances, is supposed to have taken place. If the alleged custom in favour of the sister be established, it must prevail: but it would be a custom so repugnant to the principle of the common law, and introducing a rule of descent so inconvenient and so injurious to the general interest of families, that strong evidence would be required before a Court would feel disposed to establish it.

The evidence for the Plaintiff asserting the custom in favour of the sister, as to reputation, consists, principally, of the evidence of *Philip Mayne*, and of the opinion expressed by Mr. *Southwood*; for Mr. *Shillibeer*, who published a treatise upon the custom, appears to have taken his impression from him; and *Robert Marke*, one of the Plaintiff's witnesses, although he says that he heard his father say that the Plaintiff, *Susannah Locke*, was the right heir, also says that he heard *William Blake*,

Blake, a tenant of the manor say, that he thought *John Marke*, the youngest son of the youngest nephew, was the heir. *William Upham*, also a witness for the Plaintiff, states the custom decidedly against the sister, and in favour of the nephew. There were also the depositions of *William Procter Thomas*, and of *Robert Daw*.

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The Plaintiff alleges, moreover, that there are two instances, one in *Taunton Deane*, and the other in *Taunton Late Priory*, of a sister having succeeded, to the exclusion of a nephew ; and so the fact appears to be. These two cases, however, when examined, tend to negative, rather than to prove, the title of the sister. The case in *Taunton Deane* is that of *Miss Southey*. It appears that *Mr. Kinglake* was her attorney, and applied to have her admitted. *Mr. Beadon*, the then steward of the manor, says he objected, and believed that she was not heir, and still thinks the custom is against her ; but he admitted her, because no one else applied. *Miss Southey* afterwards wished to sell the property to *Mr. Turner* ; but that gentleman declined the purchase because this same *Mr. Beadon* told him she had no title. She afterwards sold it to a *Mr. Rawlings*, who required the purchase-money to be invested in the names of trustees for twenty-one years. So that, although *Miss Southey* was admitted as heir, it seems to have been thought by all parties that her title was extremely doubtful, and, by the steward of the manor, that it was clearly bad.

The case in *Taunton Late Priory* was that of *Sarah Welch* ; it preceded that of *Miss Southey*. The same *Mr. Beadon* acted upon that occasion as attorney for a sister who claimed to be admitted, although there were nephews. *Bovett* the steward at first objected, stating that the nephew, and not the sister, was the customary heir ; but at last he admitted the sister, and required

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an indemnity. Both these cases, therefore, were against the declared opinion of the stewards of the respective manors for the time.

Such being my view of the evidence produced from *Taunton Late Priory*, it is not necessary to consider whether the custom of that manor can, under the circumstances, be used as evidence of the custom of *Taunton Deane*.

In opposition to this alleged custom in favour of the sister, and in support of the custom in favour of the nephew, there is the evidence, as to reputation, of Mr. *William Upham*, of Mr. *Beadon*, steward of *Taunton Deane*, and of Mr. *Bovett*, steward of *Taunton Late Priory*, and the depositions of *Thomas Cridland*, *Roger Hoare*, *John Periam*, and *John Handall*; and many cases are produced from the Court Rolls, bearing strongly against the title of the sister.

That representation is not altogether excluded by the custom of the manor, is proved by the fact of a grand-child having been admitted in preference to a child, as in the case of *Tucker*, who is admitted as son of *Joan*, youngest daughter of the party deceased. So in the year 1768, *Thomas Hammett* is admitted as grandson, and *Sarah*, described as daughter of the deceased, enters into the usual bond upon administering to the estate. So, in the admission of nephews, although the state of the families cannot be proved, little doubt can exist from the form of the entries, that there were uncles or aunts living, the nephew being, in several instances, described as the son of a *youngest* brother or sister of the party deceased, a circumstance shewing that there had been others; and the only doubt, therefore, is whether they might not have died before the nephew was admitted.

mitted. In the case of *John Cockeram*, who was admitted in the year 1702 as only son of *John Cockeram*, the younger brother of *Agnes Meredith*, a will is produced of *Mary Cockeram*, shewing that in the year 1690, twelve years before, there were several brothers and sisters of *Agnes Meredith* living. So, in the year 1780, *William Satchell* is admitted as nephew, and customary heir of *Mark Satchell*, and *Susannah Mason*, described as sister of *Mark Satchell*, entered into the usual bond upon administering to his estate. The case of *Clement Drake*, as proved by himself, is the same.

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It is to be observed that there is nothing in the custom, so proved in favour of the title of the nephew, inconsistent with what is stated in the Customary; although the Customary does not specify it, being too general. So neither does it specify the title of a grandson in preference to a brother or sister; although that title is proved, and is incidentally admitted in the Customary, as it states the succession of daughters to be upon failure of issue male.

I am of opinion that the evidence in favour of the title of the nephew against that of a sister greatly preponderates. I entirely approve of the verdict, and refuse with costs the motion for another trial.

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Nov. 21.

In the Matter of PRIDEAUX, a Lunatic.

Upon an application, under the 1 W. 4. c. 60., for a transfer of stock standing in the name of a lunatic trustee, the Lord Chancellor will not adopt the facts as found in the proceedings in a suit in the Court of Exchequer, but will require them to be ascertained by the usual reference.

THE lunatic and another person were the sole survivors of several trustees, in whose names a sum of 320*l.*, 3 per cent. consols, was standing, upon trust for a Mr. *Brune*, the party beneficially entitled to certain undivided shares of a real estate which had been contracted to be sold. This sum represented the value of Mr. *Brune*'s interest in the estate; and after his death, a suit having been instituted in the Court of Exchequer, in the course of which the facts relative to the stock were found, an arrangement was come to in that suit, with the consent of all parties, that a conveyance of Mr. *Brune*'s interest should be executed by his heir at law, and the stock transferred to his personal representatives.

The present petition (which was presented under the 1 W. 4. c. 60.), stated these circumstances, and prayed that, to save unnecessary delay and expense, the Lord Chancellor would adopt the finding of the Court of Exchequer, without directing a reference, and would order the committee of the lunatic to join in an immediate transfer of the stock.

The LORD CHANCELLOR said, that as the Court of Exchequer had no jurisdiction in the matter, he was not at liberty to adopt, or act upon, any proceedings which had taken place in that Court. There must be the usual reference.

The secretary of lunatics mentioned that Lord Chancellor *Brougham* had refused a similar application. (*a*)

(*a*) See also *In re Shorrocks*, 1 *Mylne & Craig*, 31.

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HILL v. RIMELL.

Nov. 21:

THE bill in this case was filed on the 11th of *July* last; the subpoena to appear and answer was served on the Defendant on the 15th of *July*; and, on the same day, he was also served with a notice that, on the 19th, the Plaintiff would move for a special injunction. On the 17th, the Defendant entered an appearance. On the 19th, which was a Seal day, no counsel appearing on the Defendant's behalf, the Plaintiff saved his notice of motion till the next Seal, which was the 29th; and on the 20th, he served a notice to that effect on the Defendant's clerk in court. On the 29th, the motion was made, and the order for the injunction obtained, in the absence of the Defendant, who did not appear by counsel. On the 16th of *November*, the Vice-Chancellor dissolved the injunction, on the ground that it had been irregularly obtained.

Service of a notice of motion upon a Defendant, before he has appeared to the bill, is irregular, unless the leave of the Court has been previously obtained.

Mr. *Stinton* now moved that the order of the Vice-Chancellor dissolving the injunction might be discharged. His Honor was of opinion, that it was not competent for the Plaintiff, without the special leave of the Court, to serve a notice of motion on a Defendant before he had entered an appearance. No trace of this rule, however, was to be found in any of the books of practice: *Practical Register* (a). Mr. *Smith* in the last edition of his *Chancery Practice* (b) laid it down that before appearance, the Defendant himself must be served, and that, after appearance, service on his clerk in court is sufficient: but he did not state, and obviously did not conceive that in the

(a) *Wyatt's* edit. 296.

(b) Vol. I. p. 65. 2d edit.

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the former case the previous leave of the Court was necessary, nor could any good reason be assigned for requiring such a sanction.

Mr. Wright, *contra*.

The LORD CHANCELLOR said, he entirely concurred with his Honor, with respect to what was the practice. The reason was that, as, until appearance, the Defendant had not submitted to the jurisdiction, the Court would not authorise any proceeding by which he might be prejudiced, unless a special case were made to justify its immediate interference. The motion must be refused.

March 22.

April 5.

Aug. 11.

In the Matter of DOWNING COLLEGE.

Upon the true construction of the Charter and Statutes of *Downing College, Cambridge*, a person who is in holy orders is not ineligible to the office of Master of the college, provided he has the other qualifications thereby prescribed.

THE petition in this case was presented by *Alfred Power, Esq.*, Barrister-at-law, late one of the lay fellows in *Downing College* in the university of *Cambridge*; and it was addressed to the King's most Excellent Majesty in his High Court of Chancery, as Visitor of the college.

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The Charter declared that the number of fellows should be sixteen, two of whom should be in holy orders, and the rest should be laymen; it then nominated three persons as fellows, all of whom were laymen; and it provided that the remaining thirteen should not be nominated until after the completion of the College buildings: *Semble*, It is not absolutely necessary that a vacancy in one of these three original fellowships, prior to the completion of the College buildings, should be supplied by the election of a lay fellow.

Effect of long and undisturbed possession in influencing the decision of a Visitor, in a case where the right may be doubtful.

The Charter for the erection and incorporation of *Downing College* was granted by his Majesty *George the Third*, and bore date the 22d of *September 1800*. It recited the will of *Sir George Downing*, Baronet, dated the 20th of *December 1717*, by which he gave and devised his real estates therein mentioned to certain trustees, all of whom died in his lifetime, upon trust to found and endow a college within the University of *Cambridge*, to be called *Downing College*, wherein should be professed and taught such useful learning as his trustees or their heirs, by and with the consent and approbation of the Archbishops of *Canterbury* and *York*, and the Masters of *St. John's College* and *Clare Hall*, in the University of *Cambridge*, in being at the time of the founding of the college, should direct and prescribe. It then recited the death of *Sir George Downing* in the year 1749, and certain proceedings by information in the Court of Chancery (*a*), and the decree pronounced therein: That in pursuance of that decree, a piece of land called *Doll's Close*, within the town of *Cambridge*, had been purchased as a site for the intended college, by *Sir George Cornwall*, Bart., and Dame *Catherine*, his wife, *Mary Goate*, *Francis Annesley*, and *William Henry Scourfield*, who were the then heirs at law of *Sir George Downing*, to whom the same was afterwards duly conveyed: That *Sir George Cornwall* and Dame *Catherine*, his wife, *Mary Goate*, *Francis Annesley*, and *William Henry Scourfield* had prepared and submitted to the then Archbishops of *Canterbury* and *York*, and the Masters of *St. John's College* and *Clare Hall*, a Scheme for the foundation of the intended college, which Scheme had been approved of by the said Archbishops, and the Masters of the said colleges, and also by the Lord Chancellor: That *Sir George Cornwall* and Dame *Catherine*,

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(a) See *Attorney-General v. Bowyer*, 3 Ves. 714.

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Catherine, his wife, *Mary Goate*, *Francis Annesley*, and *William Henry Scourfield*, on the 3d of *September* 1798, presented their petition to his Majesty, praying that a Charter might be granted to the proposed college, according to the Scheme so approved, which Scheme was annexed to their petition.

After these recitals, the Charter proceeded to ordain, constitute, and declare, that upon the piece of ground called *Doll's Close*, so purchased, there should be erected and established one perpetual college, for students in law, physic, and other useful arts and learning, which college should be called by the name of "*Downing College* in the University of *Cambridge*," and should consist of one Master, two professors, (that is to say) a professor of the laws of *England*, and a professor of medicine, and sixteen fellows, two of whom should be in holy orders, and the rest should be laymen, and of such a number of scholars as should thereafter be agreed on and settled by the Statutes of the college.

The Charter then declared and established the master, professors, fellows, and scholars of the college, and their successors for ever, a body corporate, by the name and style of "The Master, Professors, Fellows, and Scholars of *Downing College* in the University of *Cambridge*;" and the powers incident to a body corporate were thereby given to and vested in them. And it was thereby ordered and directed that the Master, professors, fellows, and scholars of the college, and their successors, should be regulated and governed, according to the statutes, rules, and ordinances, which should be made and framed by the heirs-at-law of *Sir George Downing*, with the consent and approbation of the Archbishops of *Canterbury* and *York*, and the Masters of *St. John's College* and *Clare Hall*, or the major part of them; as well concerning

concerning divine service in the new college, as also concerning the good government, regulation, and residence of the Master, professors, fellows, and scholars of the same, and the management of the lands and tenements, chattels, possessions, and revenues of the Master, professors, fellows, and scholars; and likewise concerning the salaries, stipends, and other necessities, for the scholars of the college, which were not thereby settled or provided for, and for the chaplains, officers, ministers, and other persons who should from time to time dwell and be supported in the college; and also concerning any other matter or thing, as to them should seem useful and agreeable to the Charter, and to the will of Sir *George Downing*: provided that the statutes, rules and ordinances, so to be framed and constituted, were not repugnant to the laws of the realm. And the Archbishops of *Canterbury* and *York*, and the masters of *St. John's College* and *Clare Hall*, and of the intended college, for the time being, or the major part of them, were thereby authorised and empowered (at the request of the Master, professors, and five senior fellows of the college, for the time being, to be signified in writing, under their respective hands) from time to time to revoke, repeal, alter, or make new all or any of the statutes, rules, ordinances, and constitutions, as to them or the major part of them should seem expedient; but so nevertheless, that the same should be not repugnant to the Charter, or to the will of Sir *George Downing*, or to the laws of the realm; all which statutes, rules, ordinances, and constitutions, so to be framed and made, his Majesty, for himself, his heirs, and successors, commanded to be strictly and inviolably observed and performed, so long as they should respectively remain in full vigour, under the penalties to be thereby or therein inflicted or contained.

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The Charter then nominated and appointed *Francis Annesley*, Doctor of Laws in the University of *Cambridge*, first and modern Master of the college, *Edward Christian*, Master of Arts in the same University, Barrister-at-law, to be the first professor of the laws of *England*, and *Busick Harwood*, Doctor in Physic, to be the first professor of medicine in the college. It also nominated and appointed *John Lens*, Serjeant-at-law, and *William Meek*, Barrister-at-law, Masters of Arts, and *William Frere*, Bachelor of Arts, and such thirteen other persons, to be qualified in manner thereafter prescribed respecting the election of the future fellows of the college, as his Majesty should, after the necessary buildings for the college should be erected, by writing under his sign manual, nominate and appoint, to be the first and modern fellows of the college.

And his Majesty by the Charter further declared and directed that *Francis Annesley*, *Edward Christian*, *Busick Harwood*, *John Lens*, *William Meek*, and *William Frere*, should immediately thenceforth commence and be Master, professors, and fellows of the college, in order to constitute a body corporate, for the several purposes of taking possession of the estates devised by, and to be purchased pursuant to, the will of *Sir George Downing*, and of administering the revenues thereof, and of superintending the erection of the necessary buildings of the college, and for the other necessary purposes; and that the remaining thirteen fellows, so to be nominated as aforesaid, should not be nominated, or commence, or become fellows of the college until after the erection of the necessary buildings for the same.

And his Majesty thereby further willed, declared, and directed that the future Masters of the college should be chosen from amongst those who should have been professors

fessors or fellows of the college, and should be elected by the Archbishops of *Canterbury* and *York*, and the Masters of *St. John's College* and *Clare Hall*, for the time being, and that the future professors of the college should be elected by the same Archbishops and Masters, and the Master of the intended college for the time being, from among persons qualified in the manner therein particularly described.

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The Charter further directed that the future fellows of the college, except those to be first named by his Majesty, should be elected by the master, professors, and such fellows of the college as should be of the degree of Master of Arts, from among persons who should have taken a degree in arts, physic, or civil law, in one of the two universities: provided that the person to be elected to either of the said two clerical fellowships should have taken the degree of Bachelor of Arts and should be in holy orders at the time of his election, or if not then in holy orders, should enter into holy orders within six calendar months after his election, and if he should not so do, his fellowship should become and be vacant from and after the expiration of such term. And it was thereby further directed that all such elections should be made within six calendar months after any vacancy should happen; or in default thereof, his Majesty thereby reserved to himself, his heirs, and successors, as Visitor of the college, the right of nominating some person or persons, qualified as aforesaid, to supply such vacancy.

The Charter further declared and directed that *Francis Annesley*, *Edward Christian*, and *Busick Harwood*, and such other persons as should thereafter be elected to the respective offices of Master and professors of the college, should hold and be continued in their offices respectively, during the term of their respective
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natural lives, or during so long time as they should well and faithfully demean themselves therein respectively; and that they should be removable only by the Archbishops of *Canterbury* and *York*, and the Masters of *St. John's College* and *Clare Hall*, for the time being. The Charter further declared and directed that the lay fellowships should be held only for the term of twelve years, respectively, and should within that time be vacated by those who were in the law line by their not being called to the bar within eight years after their elections; and by those who were in the medical line, by their not taking their degree of Doctor of Physic within two years after they were of sufficient standing; likewise by marriage or by entrance into holy orders, at any time within the first six years after their election, or by election into any of the superior stations of Master or professor of the college, or by possessing property of such yearly value as should be specified in the statutes. And it further declared and directed that the two clerical fellows of the college should vacate their fellowships by marriage, or by possessing property or ecclesiastical preferment, of such yearly value as should be specified in the Statutes of the college.

The Charter further declared and directed that pupils, of the respective ranks of fellow-commoners, pensioners, and sizars, should be admitted into the college, in the same manner as they were admitted into other colleges, in the university, and that they should be instructed and educated in law, physic, and such other useful learning as was generally taught in other colleges, and that they should be subject to the usual academical discipline.

The Charter further declared and directed, that out of the revenues of the college, there should be, in the first place, set apart so much as should be necessary to be applied

applied in erecting proper buildings for the college, together with any other funds applicable for that purpose, under the direction of the Court of Chancery; and that when such buildings should be completed to the satisfaction of the Court, or a proper fund should be set apart, under the order of the Court, for that purpose, the master, professors, and fellows of the college, should receive out of the remainder of such revenues, if sufficient for that purpose, after paying all other necessary expenses and disbursements, the stipends following (that is to say), the yearly stipend to the Master should be 600*l.*, and the yearly stipend to each of the professors 200*l.*, and the yearly stipend to each of the fellows 100*l.*: but if there should be any deficiency in the revenues of the college, the several stipends should abate in proportion; and if there should at any time be any surplus of such revenues, the same should accumulate for the benefit of the college, or should be from time to time paid, applied, and disposed of in such manner as the Master, professors, and fellows for the time being, or the major part of them should direct.

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And it was his Majesty's will and pleasure, that no payment should be made in respect of any such stipends as aforesaid, until the expense of the buildings proper for the college should be fully provided for, by setting apart sufficient funds for that purpose, in such manner as the Court of Chancery should direct.

And his Majesty thereby reserved to himself, his heirs, and successors, all visitatorial power and authority over the college; and also declared that the Charter should be taken, construed, and adjudged, in all his courts, or elsewhere, in the most favourable and beneficial sense, and for the best advantage of the college.

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In pursuance of the provisions of this Charter, a body of statutes for the regulation and government of the college, and the other purposes directed by the Charter, was made and framed by the heirs at law of Sir *George Downing*, with the consent and approbation of the Archbishops of *Canterbury* and *York*, and the Masters of *St. John's College*, and *Clare Hall*. These Statutes were dated the 23d of *July* 1805. The most material provisions in them are the following:—

Statute 1. intituled “*Of publication and construction of the Statutes,*” (among other things) regulates the seniority and precedence of the different members of the college, and declares that the master shall be the senior member.

Statute 2. “*Of the Scholars,*” regulates the mode of electing the scholars, and (among other things) ordains that the number of the scholars shall be six: that the persons eligible to scholarships shall be such persons, admitted of some college or hall in the university of *Cambridge* or *Oxford*, as have not commenced their actual residence in any college or hall more than one year and a half before the day of election: that every person elected to a scholarship, if he is not already a member of the college, shall immediately be admitted, and shall reside there two thirds of *Michaelmas* and *Lent* terms, and the first half of *Easter* term, till such time as he takes the degree of B. A., or is of sufficient standing to do so: that every scholar shall receive a yearly stipend of fifty pounds, or half a fellowship: that the two first scholars shall be elected on the first day of election, after the necessary buildings of the college shall be erected and the number of fellows completed, according to the provisions of the Charter: that the two next scholars shall be elected in the year following, and the

the two remaining scholarships shall be filled up one on each of the two succeeding years, &c.

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Statute 3. "Of the Master," commences as follows: "The office of Master is that to which the first rank and the greatest emoluments are assigned; and to that office shall belong the highest authority in the college, in the government, discipline, administration of the revenue, and all other matters whatsoever concerning the society. In every thing not otherwise specially provided for, his authority shall decide and direct; and he shall be at liberty to frame new regulations, not inconsistent with the Charter or statutes, in every point left unsettled thereby; provided that all such regulations shall be made known to the resident members of the degree of Master of Arts or higher degree; and if they are disapproved of by two third parts of such members, then such regulations shall be of no force. In all elections in which the Master is an elector, and in all decisions in which he is one of the deciding body, where there shall be equality of votes, he shall have a casting voice."

The Statute, then, after defining particularly the powers of the Master over the different members and servants of the college, declares that "the professors and fellows of the college, for the time being, shall be eligible to the mastership, as well as those who have formerly been professors and fellows." It next proceeds to regulate the time and manner of electing the Master; and provides that, in case the electors, or the major part of them, shall not agree in the election of a Master within the spaces of time thereby respectively fixed for that purpose, "then the appointment of the Master, from among the persons qualified according to the Charter, shall be vested in the Lord High Chancellor, as visitor of the college on behalf of the Crown." After prescribing the form of the oath to be taken by the Master on his elec-

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tion, and the mode in which he is to be suspended or removed in case of misconduct, the Statute continues as follows : — “ In case of the absence of the Master, or of his inability to act, he shall appoint one of the professors or resident fellows, of the degree of Master of Arts or other higher degree, to be Vice-Master, and to act in all things for him, as his deputy, during such absence or inability, with the same authority as the Master himself. And, in case of the inability or neglect of the master to appoint a Vice-Master, and during the vacancy of the mastership, in case there shall be no Vice-Master at that time, then the resident member who was last Vice-Master, or in default of such person, then the senior resident member shall act during such vacancy, inability, or neglect. Provided always, that the Master shall be resident in college during two thirds of *Michaelmas* and *Lent* terms, and the first half of *Easter* term, in every year, unless some one or more of the professors or of the lay fellows, of the degree of Master of Arts or other higher degree, shall accept the appointment of Vice-Master, and reside in his stead during the before-mentioned parts of any one or two of the said terms, in which case the Master shall not be required to reside more than the before-mentioned parts of the remaining two or one of the said terms. And the Master shall have power to require each of the professors to accept the appointment of Vice-Master, and to reside as such during the before-mentioned parts of any one of the said three terms ; and in case any Master or professor shall make any wilful default in his residence, hereby required, the place and office of such Master or professor shall become, *ipso facto*, vacant. This regulation, as to the residence of the Master or Vice-Master, shall not be in force until the necessary buildings of the said college shall be erected, and the number of Fellows completed according to the Charter.”

Statute

Statute 4. "Of the Professors," (among other things) declares that "no Master of the college shall be eligible to a professorship; and if either professor shall ever be elected to the other professorship, he shall, *ipso facto*, vacate his former professorship."

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"And whereas it is provided by the charter that the professors shall read such lectures or courses of lectures, in their several departments, as the electors to the professorships for the time being, or the major part of them, shall from time to time order, direct, and appoint; now it is hereby ordered, until further regulation in that behalf, with the consent and by the authority of the said electors, attested by their signatures annexed to these statutes, that each of the professors shall, after the commencement of any payments in respect of their salaries in every year, read one course of twenty-four lectures at the least, of one hour each in length, on twenty-four different days in *Lent, Easter, or Michaelmas* terms, in the faculty of which he is a professor, on the usual terms on which public lectures are given in the university, and in addition to any lectures which he may be obliged to give in respect of any other appointment in the university. And in case any professor shall wilfully make default in any one year (without unavoidable impediment, whereof the proof shall be on himself) he shall forfeit, for the first omission, one half of the stipend of his professorship, for the second, two thirds of the same stipend, and for the third, shall be liable, on complaint made by any member of the college to the electors aforesaid, to be deprived of his place and office, and shall not be competent to be elected into the same, or the other professorship at any future time. The professorships shall also be vacated by election to the mastership or to a fellowship."

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"Each of the professors shall, after the erection of the necessary buildings, and the completion of the number of fellows according to the Charter (whether he be a Vice-Master or not), be resident in college during two thirds of *Michaelmas* term or *Lent* term, or the first half of *Easter* term in each year, as shall be required by the Master, over and above such residence as may be necessary for reading the lectures hereby appointed."

Statute 5. "Of the Fellows," after appointing the time for the election of the fellows, declares, that "the candidates shall be qualified as directed by the Charter; but no person shall be eligible to a lay fellowship who is above the age of twenty-four years, nor to a clerical fellowship who is above the age of thirty, or under the age of twenty-three. Each candidate, before he is admitted to be examined, shall produce a certificate of his degree, as required by the Charter, and a testimonial of his good moral character, signed by the Master or tutor of his college, and shall specify whether he is a candidate for a lay or clerical fellowship, and shall make a declaration in writing that he is a member of the Church of *England*. As in the election of scholars, so in that of fellows, among candidates qualified according to the Charter and these Statutes, no preference shall be given in respect of their college, place of birth, or education, but the election shall be entirely decided by the examination. And in order further to secure the freedom and impartiality of elections, it is hereby declared, that there shall at no time be eight fellows of this college born in the same county, and that any election contrary to this provision shall be null and void. The electors shall be such as are directed by the Charter, provided that no elector shall be entitled to vote who has not been present at, and taken part in the examination. Notice of the election

tion and days of examination, together with the specification of the fellowships vacant, whether clerical or lay, shall be given in the same manner as is directed in the Statute respecting scholarships."

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After some further directions with respect to the election and admission of fellows, the Statute contains this clause — "The examination shall be on all subjects of academical learning, without preference to any branch of science or literature above others studied in the university at the time." The Statute then declares that, "the regulations contained in these Statutes respecting the election of fellows, and the period of commencement and determination of their fellowships, shall not be in force till after the erection of the necessary buildings, and the nomination of the remaining thirteen fellows, according to the Charter; but after that time the regulations contained in these statutes, with respect to the determination of fellowships, shall apply to the fellows then or before that time elected or nominated, as well as to those fellows who shall be elected in all future times."

It then proceeds to make certain regulations concerning the clerical fellowships, with reference to the time when the holders of such fellowships shall take orders; and it declares, that "every person elected to a clerical fellowship shall immediately enter his name, and specify that he is a clerical fellow, in a book to be kept for that purpose." After some further provisions respecting lay fellowships, the statute proceeds in these words: — "And whereas the appointments of the clerical fellows may continue for life, and, from the nature of their sacred profession, they are not only enabled to pursue their studies and exercise their functions within the university, but are also well qualified thereby to

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execute several of the offices in the college, and to superintend the education of the undergraduates, it is therefore ordained that such clerical fellows shall reside in the college two thirds of *Michaelmas* and *Lent* terms, and the first half of *Easter* term; and that in case of wilful default therein, they shall forfeit one half of the yearly stipend of their fellowships. And whereas the lay fellowships are only designed as a temporary assistance to those who are in the active pursuit of the professions of law and physic, which professions in general confine the attention and fix the residence of their members at a distance from the university, it is ordained that no residence in the college whatever shall be required of such fellows, in respect of their fellowships."

The Statute also declares, that "the fellowships, whether clerical or lay, shall be vacated by the possession of permanent annual income, of any description, to the amount of four times the annual value of the stipend for the time being."

Statute 6. "Of the Chaplains," (among other things) directs that the chaplains shall be two, and shall be nominated by the master, who is directed to give a preference to a fellow of the college, if qualified for the office; and that "they shall receive for their services as chaplains the annual stipend of 50*l.* each, or one half of a fellowship."

Statute 7. "Of the Dean," and *Statute 8. "Of the Bursar,"* regulate the appointment and prescribe the duties of those officers respectively.

Statute 9. "Of the Tutor," provides for the appointment of a tutor, to be nominated by the Master, and directs, among other things, that he "shall reside during

during his continuance in office, for the same time that is required for the clerical fellows, and under the same penalties."

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Statute 10. "Of the Librarian," provides for the appointment, and prescribes the duties of that officer.

Statute 11. "Of the Steward," after directing the annual appointment of a steward by the Master, from among the professors and fellows, and prescribing his duties, declares that "it shall be lawful at all times for the Master himself to hold either of the offices of bursar, tutor, or librarian; but that he shall neither hold two of the said offices of bursar, tutor, and librarian, nor shall he hold any other of the offices in the college, while there is any other person qualified according to the statutes to hold such office. And it is further declared, that no one person shall, while there is another so qualified and willing, hold the offices of dean and chaplain, or the offices of bursar and steward united, or any more than two of the above offices of chaplain, dean, bursar, tutor, librarian, and steward." The Statute concludes with a proviso "that no person shall be appointed to any of the above offices, until from the state of the college there shall be occasion for his service."

Statute 12. "Of Divine Service," after making provision for the performance of divine service, declares that "this statute shall not be in force until the erection of the necessary buildings for the college, and the completion of the number of fellows."

Statute 13. "Of the Revenues," contains a variety of regulations respecting the management of the college property and revenues; and, among other things, it directs that "the college seal shall be kept by the
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Master under two different keys, one of which shall be in his custody, and the other in the custody of the bursar."

Statute 14. "Of Benefices," after directing that when any ecclesiastical benefice in the gift of the college shall become vacant, the Master shall, in the manner therein specified, give notice of such vacancy, and of the day on which the college will present to the benefice, continues as follows; — "On that day the Master, professors, and fellows, present in college, or the major part of them, shall meet together for that purpose, and shall present the senior member of the college, then in holy orders, who will accept the same; and in case no member of the college is willing to accept such benefice, then it shall be presented to some person in holy orders, who has formerly been member of the college, and who had not, at the time of the vacancy, any benefice of double the actual value of a fellowship, such last-mentioned persons having preference according to the date of their admission into the college. And it is hereby declared, that every person to whom a presentation is made shall within one month after the day on which he receives notice thereof, signify to the senior member resident in college, his acceptance or refusal of the same; and that acceptance of a presentation shall be considered as coming into immediate possession of ecclesiastical preferment, for the purpose of vacating a fellowship or scholarship."

Statute 15. "Of Admission," regulates the admission of pupils, whether fellow commoners, pensioners, or sizars, to the college, and requires, among other things, that "every pupil present in the university at the time of his admission shall be examined in the Greek and Latin languages and other learning which may be necessary

necessary to enable him to proceed with the studies of the college, by the Master, tutor, and dean; and such only shall be admitted as are considered by all of them to be sufficiently qualified in such learning."

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Statute 16. "Of Residence," Statute 17. "Of Rooms," Statute 18. "Of Commons," and Statute 19. "Of the College Servants," contain regulations respecting the subjects mentioned in their respective titles. The Statute "*Of Commons,*" concludes in these words, "This statute shall not take place until sufficient buildings shall have been completed for the residence of the present members."

The petition, after stating the substance of the royal Charter, and the most material provisions in the college statutes, went on to allege that by the Scheme referred to in the Charter, and which is now preserved among the records of the college, it is (among other things) proposed to be provided "that two of the fellows shall be in holy orders, for the purpose of performing divine service, and that all the other fellows shall be laymen; a principal object of the foundation being to supply whatever is defective in other establishments, in which abundant provision is made for the clergy, but they contain a very small number of lay fellowships; and because the college will be possessed of scarcely any ecclesiastical patronage, to make a provision for such fellows as should choose to enter into holy orders; and that when either of the two clerical fellows shall vacate his fellowship, another person, who shall have taken the degree of Bachelor of Arts, shall be elected into his place from any college in the university, provided the person so elected be in holy orders at the time of his election, or if he shall be then a layman, shall enter into holy orders within six months after his

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his election, in default of which his fellowship shall be declared vacant."

The petition then stated that *William Meek*, one of the original lay-fellows of the college, having vacated his fellowship, by marriage, in the month of *December* 1807, *Charles Skinner Matthews* was, after due notice that a lay fellowship had become vacant, and a subsequent examination in *April*, elected into the fellowship so vacant, and thereupon subscribed himself in the college books, which contained the entry of his election, as a fellow in the law line. That the fellowship of *William Frere* became vacant by marriage in the year 1810, and thereupon, after a like notice and examination, *Cornwallis Hewett* was elected into such lay fellowship in *October* 1810, and subscribed himself in like manner as a fellow in the medical line. That in the year 1811, the fellowship of *Charles S. Matthews* having become vacant by his death, *Thomas Cadogan Willetts*, after similar notice and examination, was elected into the vacant fellowship, and subscribed his name as a fellow in the law line. That the fellowship of *John Lens* having become vacant by lapse of time, *Robert Monsey Rolfe* was, in *October* 1812, after the like notice and examination, elected a lay fellow, and subscribed himself in the college books as a fellow in the law line. That *Francis Annesley*, the first Master of the college, died in the year 1812, and that *William Frere*, Serjeant at law, was thereupon appointed to the mastership. That in the year 1814, *Cornwallis Hewett* was appointed to the medical professorship, vacant by the death of *Busick Harwood*; and that after the like notice and examination, *Samuel Grove Price* was elected into the lay fellowship vacant by the promotion of *Cornwallis Hewett*, and subscribed himself in the college books as a fellow in the law line. That in *May* 1823, *Thomas Starkie* was appointed to the law professorship

vacant

vacant by the death of *Edward Christian*. That the fellowship of *Thomas C. Willetts* having become vacant in the same year by resignation, it was agreed by the members of the college that, upon such vacancy, they should proceed to elect a clerical fellow; and accordingly, the Rev. *Richard Dawes*, chaplain, was, on the 2d of *July* 1823, elected a clerical fellow, and subscribed his name as such in the college books. That *Robert M. Rolfe* having resigned his fellowship in *May* 1824, it was agreed at a meeting of the resident members of the college, that it was expedient to elect a clerical fellow; and accordingly, *Thomas Worsley*, B. A. of *Trinity* college, was, on the 8th of *May* 1824, elected a clerical fellow, and thereupon subscribed his name as such in the college books.

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The petition further stated that the election, as well of *Thomas Worsley*, as of *Richard Dawes*, was made without any notice of vacancy and without any previous examination. That on the 8th of *May* 1824, *Worsley* was upwards of twenty-four years of age, and that within four months afterwards he entered into holy orders. That on the 25th of *May* 1836, *William Frere*, the then Master of the college, died, and that on the 23d of *June* following the Rev. *Thomas Worsley*, who had been so elected a clerical fellow in the room of *Robert M. Rolfe*, was chosen his successor by a majority of the electors appointed by the Charter for that purpose; although at the time *Cornwallis Hewett*, *Thomas Starkie*, *Robert M. Rolfe*, *Samuel G. Price*, and the petitioner, were laymen eligible to the office.

The petition then, after stating that the buildings for the college, directed by the Charter to be erected, had not as yet been completed, but that a fund for that purpose had been set apart under the direction of the Court of Chancery, submitted and insisted that it

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was contrary to the provisions of the charter that any clerical fellows should be elected, until after the buildings necessary for the college should have been erected ; and that the nomination of the first clerical fellow was by the Charter reserved to the Crown, to be exercised when the buildings should be completed. It also submitted that, according to the provisions of the Charter, no vacancy in a fellowship, created and constituted as a lay fellowship, could be duly filled up by a clerical fellow ; but that, according to the Charter, a vacancy in a lay fellowship ought to be filled up by a layman ; and further, that under the provisions of the Charter, a clerical fellow was not, under any circumstances, eligible to the office of Master. Upon these grounds the petitioner submitted that the election of the Rev. *Thomas Worsley* to be Master of the college was void.

The petition prayed that his Majesty, as Visitor, would make a declaration accordingly ; and would direct the electors to proceed to make choice of some other person to be the Master, from amongst the professors and lay fellows, qualified to be Master according to the provisions of the Charter ; or if, under the circumstances, the nomination to the mastership devolved on the Crown, then that his Majesty would forthwith nominate to the office.

The matter was referred, in the usual course, to the Lord Chancellor, who was assisted, on the hearing of the petition, by the Master of the Rolls and the Vice-Chancellor.

The *Attorney-General*, Mr. *Pemberton*, Mr. *Knight*, Mr. *Loftus Lowndes*, and Mr. *Romilly*, in support of the petition.

The

The *Solicitor-General*, Sir *W. W. Follett*, and Mr. *Jacob*, *contra*.

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The case made on behalf of the petitioner resolved itself chiefly into two points; first that Mr. *Worsley* was ineligible, and ought not to have been appointed to the office of Master, by reason of his being in holy orders: and secondly, that Mr. *Worsley* had never been *de jure* a fellow of the college, and upon that ground also was not a person qualified to be appointed Master.

Upon the first point it was insisted that the whole scope and tenor of the Charter, Scheme, and Statutes distinctly recognized the office of Master as a lay, and not as a clerical, appointment; and that, upon the fair and reasonable construction of those instruments, the election of a Master who was a clergyman, was, by a necessary implication, excluded, under any circumstances; or was, at any rate, excluded, so long as the buildings remained incomplete. Upon the second point it was contended that, inasmuch as the first nomination of the whole sixteen fellows, clerical as well as lay, of whom the establishment, when completed, was to consist, was expressly vested in the Crown, and the first three fellows nominated by the Crown were lay fellows, it was not competent to the college, when vacancies occurred, and it was in fact a fraud upon the rights of the Crown, to alter the original character of those fellowships, by substituting a new description of fellows, having totally distinct rights and duties, and a more valuable and permanent interest in their offices, in the place of the fellows, whom, having regard to the then state and exigencies of the college, the Crown had thought proper to appoint. And it was further submitted that, at all events, the college were not entitled to take

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take such a course, or to proceed to the election of any clerical fellows until the college buildings should have been finished.

The argument, as well in support of these several propositions, as in opposition to them, consisted principally of a minute and critical commentary on the effect of the different clauses and provisions contained in the Charter and Statutes of the college.

For the petition, *The King v. Stokes (a)* was relied upon to shew that the original defect of title in *Mr. Worsley* to a fellowship was not cured by the period during which it had been subsequently permitted to remain unchallenged, so as to render him eventually eligible, as a good fellow, to the office of Master.

Upon the effect of lapse of time in curing the supposed defect in *Mr. Worsley's* title as fellow, and in inducing courts of justice and Visitors to abstain from exercising a discretionary jurisdiction in such a manner as would disturb a state of things which had been long acquiesced in, the following authorities were cited, on behalf of the respondent; — *Comyns' Digest (b)*, *The King v. Dickin (c)*, *The King v. Peacock (d)*, *The King v. Clarke (e)*, *The King v. Trevenen (g)*, *The King v. Benney (h)*, *The King v. Parkyn (i)*, *The Attorney-General v. Hartley (k)*, *In the Matter of Queen's College Cambridge. (l)*

The

- (a) 2 *M. & Sel.* 71.
(b) *Franchise*, (F. 10.)
(c) 4 *T. R.* 282.
(d) 4 *T. R.* 684.
(e) 1 *East*, 38.

- (g) 2 *B. & Ald.* 359.
(h) 1 *B. & Adol.* 684.
(i) 1 *B. & Adol.* 690.
(k) 2 *Jac. & W.* 353.
(l) 5 *Russ.* 64.

The VICE-CHANCELLOR.

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It appears, from the recital of the will of the founder, Sir *George Downing*, in the commencement of the Charter, that his intention was that his trustees should purchase the inheritance of some piece of ground within the town of *Cambridge*, proper and convenient for the erecting and building a college, and thereon should erect and build all such houses, edifices, and buildings as should be fit and requisite for that purpose; which college should be called by the name of *Downing College*, and that a Charter royal should be sued for and obtained, for the founding such college, and incorporating a body corporate, by that name, in and within the University of *Cambridge*, which college should consist of such head or governor, and of such fellows, scholars, members, and other persons for the time being, and should be maintained, governed, and ordered by such laws, rules, and orders, and in such manner, and wherein should be professed and taught such useful learning, as his trustees, by and with the consent and approbation of the Archbishops of *Canterbury* and *York*, and the Masters of *St. John's College* and *Clare Hall*, in being at the time of founding the said college, should direct, prescribe, and appoint.

It is observable that the founder's will gives no direction who should be head or governor of the college, or how he should be chosen or appointed; or who should be fellows, or what useful learning should be taught in the new college. Every direction upon these points was, by the express words of the will, to be given by the trustees, with the consent and approbation of the two Archbishops and the Masters of *St. John's* and *Clare*, and was, by implication, especially to be given with the consent of the King, without whose consent no charter could be obtained.

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The general nature of the college and its constitution must therefore be determined, not by the founder's will itself, but by what arose out of the founder's will. Sir *George Downing* died in the year 1749. After his death a suit was commenced in the High Court of Chancery; and a decree was pronounced, establishing the will, and directing the trusts of it to be carried into execution, in case his Majesty should be pleased to grant his royal Charter, and his royal licence to the college, to take in mortmain the tenements devised; and the heirs at law, who seem to have been substituted for the trustees, were to be at liberty to apply to his Majesty for that purpose. In pursuance of the decree, certain lands were purchased as a site for the college, and were conveyed to the heirs at law of the testator. The heirs at law prepared and submitted to the two Archbishops and the Masters of *St. John's College* and *Clare Hall*, a Scheme for the foundation of the college, which Scheme was approved of by the Lord Chancellor; and then his Majesty *George the Third* granted a Charter, dated the 22d day of *September*, in the fortieth year of his reign.

The Charter directed that the college should be regulated and governed according to Statutes to be made and framed by the heirs at law of Sir *George Downing*, by and with the consent and approbation of the two Archbishops and the Masters of *St. John's College* and *Clare Hall*. And, accordingly, certain Statutes were made, dated the 23d of *July* 1805; and the questions upon which my Lord Chancellor has requested that I would state my opinion, can only be solved by considering the Scheme, the Charter, and the Statutes; for, the college is in a state so imperfect, and the time which has elapsed since its first institution is so short, that we cannot resort to usage in order to determine those questions.

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By the Charter it was provided that, upon the intended site there should be erected one perpetual college for students in law, physic, and other useful arts and learning, which should be called by the name of *Downing College*, in the University of *Cambridge*; and should consist of one Master, two professors, that is to say, a professor of the laws of *England*, and a professor of medicine, and sixteen fellows, two of whom should be in holy orders, and the rest should be laymen; and of such a number of scholars as should thereafter be agreed on and settled by the Statutes of the college.

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The Charter then incorporated the master, professors, fellows, and scholars, and gave them licence to hold in mortmain, and made the college part of the University of *Cambridge*.

The Charter then named *Francis Annesley*, Doctor of Laws, to be first and modern Master; *Edward Christian*, Esq. M. A. and Barrister at law, to be first Professor of the Laws of *England*; and *Busick Harwood*, Doctor in Physic, to be the first Professor of Medicine in the college; and appointed *John Lens*, Serjeant at law, *William Meek*, Barrister at law, Masters of Arts, and *William Frere*, Bachelor of Arts, "and such thirteen other persons to be qualified in manner hereafter prescribed respecting the election of the future fellows of the said college, as we shall, after the necessary buildings for the said college shall be erected, by writing under our sign manual nominate and appoint to be the first and modern fellows of the aforesaid college." It then directed and declared that the said *Annesley*, *Christian*, *Harwood*, *Lens*, *Meek*, and *Frere* should immediately thenceforth commence and be Master, professors, and fellows of the college, in order to constitute a body corporate for the several purposes of taking

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possession of the estates devised by, and to be purchased pursuant to, the will of Sir *George Downing*, and of administering the revenues thereof, and of superintending the erection of the necessary buildings of the college, and for the other necessary purposes; and that the remaining thirteen fellows of the college, so to be nominated, should not be nominated or commence or become fellows of the college, until after the erection of the necessary buildings for the same.

It appears to me that, from the date of the Charter, *Downing College* had complete existence, as a corporate body, for all purposes intended to be accomplished by it, except such alone, if any, as could not be accomplished without having the remaining thirteen fellows nominated and actually become fellows.

The Charter then directed, in the very words of the Scheme, that future Masters of the college should be chosen from amongst those who should have been professors or fellows of the college, and should be elected by the two Archbishops and the Masters of *St. John's College* and *Clare Hall*: and the 3d of the Statutes, putting an interpretation upon those words, provides that the professors and fellows of the college, for the time being, shall be eligible to the mastership, as well as those who have formerly been professors and fellows. This interpretation seems to me to be rather superfluous and unnecessary; but it is not unimportant with regard to the questions brought forward by Mr. *Power's* petition, as it shews the anxiety of those who framed the statutes, to leave nothing doubtful, where it was likely that a doubt might arise, and they could remove the doubt.

There is nothing else in the Scheme, the Charter, or the Statutes to point out the persons who shall be eligible to be Master.

The

The Charter then directed, "that the future professors of the said college shall be elected by the Lord Archbishop of *Canterbury*, the Lord Archbishop of *York*, and the Masters of *St. John's College* and *Clare Hall*, and of the said intended college to be called *Downing College*, for the time being, from among persons qualified in the following manner, (that is to say) the Law Professor shall be, at the time of his election, a Doctor of Laws, a Master of Arts, or a Bachelor of Laws in one of our two universities of *England*, of ten years standing from his matriculation, and also a Barrister at law; and the Professor of Medicine shall be, at the time of his election, a Master of Arts, who shall have been licensed to practise physic for the space of two years, or a Doctor or Bachelor of Physic, in one of our said two universities of *England*, or a member of some one of the *Scotch* universities, of seven years standing, and twenty-five years of age, who shall have attended the medical lectures in one of the *Scotch* universities for four years." And it directed "that the future fellows of the said college, except those to be first named by us as aforesaid, shall be elected by the Master, professors, and such fellows of the said college as shall be of the degree of Master of Arts, from among persons who shall have taken a degree in Arts, Physic, or Civil Law in one of our said two universities of *England*; provided that the person to be elected to either of the said two clerical fellowships shall have taken the degree of Bachelor of Arts, and shall be in holy orders at the time of his election, or if not in holy orders at the time of his election, shall enter into holy orders within six calendar months after his election; and if he shall not do so, his fellowship shall become and be vacant, from and after the expiration of such term of six calendar months from the day of such election."

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This clause, upon the face of it, applies as well to elections that should take place before the Crown had named the thirteen fellows to be first named by the Crown, as to those that should take place after; and, therefore, does, upon the face of it, provide for the election of a clerical fellow, when the Crown has not named the remaining thirteen fellows.

The Charter then directed "that the said *Francis Annesley*, *Edward Christian*, and *Busick Harwood*, and such other persons as shall hereafter be elected to the said respective offices of Master and Professors of the said college, shall hold and be continued in their said offices and places respectively during the term of their respective natural lives, or during so long time as they shall well and faithfully demean themselves therein respectively; and that they shall be removable only by the Lord Archbishop of *Canterbury*, the Lord Archbishop of *York*, and the Masters of *St. John's College* and *Clare Hall*, in our said university, for the time being." And it directed, "that the said lay fellowships shall be held only for the term of twelve years respectively; and shall, within that time, be vacated by those who are in the law line, by their not being called to the bar within eight years after their elections; and by those who are in the medical line, by their not taking the degree of Doctor of Physic within two years after they are of sufficient standing; likewise by marriage, or by entrance into holy orders at any time within the first six years after their election; or by election into any of the superior stations of Master or professor of the said college; or by possessing property of such yearly value as shall be specified in the Statutes."

The Statute which relates to the election of fellows directs that "the candidates shall be qualified as directed

rected by the Charter: but no person shall be eligible to a lay fellowship, who is above the age of twenty-four years; nor to a clerical fellowship, who is above the age of thirty, or under the age of twenty-three." "Notice of the election and days of examination, together with the specification of the fellowships vacant, whether clerical or lay, shall be given in the same manner as is directed in the Statute respecting scholarships." "The regulations contained in these Statutes respecting the election of fellows, and the period of commencement and determination of their fellowships, shall not be in force till after the erection of the necessary buildings, and the nomination of the remaining thirteen fellows according to the Charter."

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The necessary buildings here alluded to have not yet all been built: some only of them have been built. The Crown has not yet named any of the remaining thirteen fellows, the first nomination of whom was reserved to the Crown: but, as vacancies arose in the Mastership, professorships, and fellowships first appointed, they have been supplied by election.

On the 8th of *May* 1824, Mr. Solicitor-General (*a*), being then a fellow, resigned; and on the same day Mr. *Thomas Worsley*, being then above the age of twenty-four years, was chosen as a clerical fellow, without any advertisements previously given, or examination previously had, and entered into holy orders within six months after his election; and on the 29d of *June* 1836, he was elected Master of *Downing College*; and the question is whether he was duly elected Master.

It is said that he never was duly elected fellow, because he was elected as a clerical fellow; and that no
 clerical

(*a*) Sir *Robert M. Rolfe*.

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clerical fellow could be duly elected, until the Crown had first nominated a clerical fellow. Whether that proposition be true or not, it is not necessary to determine in the present case; for Mr. *Worsley*, at the time he was elected fellow, was not in holy orders, and therefore was capable of being elected a lay fellow; and, though he was elected for the purpose of becoming a clerical fellow, the purpose could not vitiate the election; and, though it may be true that by subsequently taking orders he vacated the fellowship, yet, until he took orders, he was a good fellow, and in that respect, therefore, eligible, at a future time, to be Master. It is further said that his election, as a fellow, was bad, because he was above the age of twenty-four, and because no advertisements were given, or examination had; but, those requisites are only prescribed by the 5th Statute, which expressly provides that the regulations in it, respecting the election of fellows, shall not be in force till after the erection of the necessary buildings, and the nomination of the remaining thirteen fellows, according to the Charter.

It is said, however, that no person in holy orders could be elected Master; and, to support that proposition, reference has been made to various parts of the Scheme, the Charter, and the Statutes, from which small inferences, merely conjectural, have been drawn, that *Downing College* was to be a lay college, with the exception of the two clerical fellows, and that the Master was to be a layman. It is not necessary to examine these passages and the reasonings upon them, in detail, because, in the first place, it is nowhere expressly said that a person in holy orders shall not be eligible to be Master; and it is an inference, at least as strong as the other inferences, that, if it had been the intention of the Crown or of the framers of the Statutes, (who in many respects have provided

vided for very minute matters,) that a man in holy orders should not be chosen Master, it would have been so expressed; but not a word to that effect can be found. What, however, appears to me to be absolutely overwhelming and irresistible upon this point is this, that the rules respecting the professors and lay fellows are such that it might happen, that, though they had all been lay, at their first election, they might at a given time be all in holy orders. The professors may take orders at any time, or be in orders when first appointed. The lay fellows may take orders at the end of six years from their election. But the Charter, as explained by the Statutes, is imperative that the Master shall be chosen from those who are, or have been professors or fellows. If all who were, or had been professors or fellows were in orders, one of them must be chosen. It is vain, therefore, to say that Mr. *Worsley* was ineligible because he was in orders.

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The opinion which I humbly tender to his Lordship is, that Mr. *Worsley* has been duly elected, and that the petition should be dismissed; but that, as in similar instances, the costs of all parties should be paid out of the college funds.

The MASTER of the ROLLS.

Mr. *Worsley* was elected a fellow, and called a clerical fellow, of *Downing College*, in *May* 1824, and he was elected Master of the same college in *June* 1836.

The petition alleges that both the elections were illegal; that by the Charter and Statutes of the college, a clerical fellow is not qualified to be elected Master; and even if a clerical fellow might be elected Master, yet that Mr. *Worsley* was not duly elected Master, because he never was, *de jure*, a fellow of the college.

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1. By the Charter it was declared (p. 11. (a)), that the college should consist of one Master, two professors (one, of the Laws of *England*, and the other, of *Physic*), and sixteen fellows, two of whom should be in holy orders, and the rest laymen, and such a number of scholars as should be settled by the statutes. One Master, two professors, and three fellows were appointed (p. 18.); and it was directed that the future Masters should be chosen from amongst those who should have been professors or fellows of the college. (pp. 19, 20.)

By the Statutes it was provided that the professors and fellows of the college, for the time being, should be eligible to the office of Master, as well as those who had formerly been professors and fellows.

In these words, describing the persons who are eligible to the office of Master, there is nothing which in any way indicates that clergymen or clerical fellows are to be excluded; and there is no proviso to that effect, either in the Charter or Statutes: but it is argued that from the general scope and purpose of the Charter and Statutes, and from various particular expressions and omissions; it may be collected, that the election of a Master who was a clergyman, or had been a clerical fellow, was never contemplated; and that the effect of the documents, upon the true construction of them, amounts to a proviso that a clergyman or clerical fellow shall not be eligible to the office of Master.

On looking through the Charter and Statutes, it does not appear to have been intended positively to exclude clergymen

(a) The references are to the pages in the printed copy of the Charter and Statutes.

clergymen from any office. Two of the fellows were to be clergymen, the rest laymen: they are distinguished by the names of clerical and lay fellows. The professors of the Laws of *England* and of Medicine were to be qualified in the manner pointed out (p. 20.); and the lay fellows were to vacate their fellowships by entering into holy orders within six years after their election; but, consistently with these regulations, it would seem that the Master, professors, and lay fellows might all of them enter into holy orders, without vacating their offices: and this being so, it seems unreasonable to deduce from vague and uncertain expressions, and from the absence of particular provisions, any such conclusion as that which is contended for on behalf of the petitioner, viz., that a clergyman or clerical fellow was not eligible to the office of Master.

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The expressions in the Statutes (p. 46.), which were variously commented upon, appear to admit of a simple explanation.

The professors and the clerical fellows are bound to residence (pp. 49, 55.); and the clerical fellows are mentioned as the persons qualified to execute several offices in the college, and to superintend the education of the undergraduates (p. 55.). In this state of things the Statutes say (p. 46.), that the Master shall be resident during two thirds of *Michaelmas* and *Lent* terms, and the first half of *Easter* term, but allow an exemption during the appointed part of one of those terms, on the condition that a professor or a lay fellow should, during the time of the exemption, hold the office of Vice-Master, and reside instead of the Master.

Considering the intended employment of the clerical fellows, the offices they were intended to fill, and their engagement

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engagement in tuition, it would not be convenient either to withdraw them from the performance of their proper duties, or to exempt them from the superintending authority of the Master or his substitute; and, the clerical fellows being, as it appears to me, very properly, omitted for that reason, the only persons from whom the Vice-Master (to act for the Master in his absence) could be chosen, were the professors and the lay fellows.

But the professors, if duly qualified in their respective branches, and the lay fellows, if of more than six years standing, might be clergymen; and I cannot from this, or any other part of the Statutes, infer that the Master was not to be a clergyman, or elected from clerical fellows.

2. Upon the second point, that Mr. *Worsley* was never, *de jure*, a fellow, it was contended that, from the commencement of the foundation, lay fellowships and clerical fellowships were to be considered as entirely distinct offices or benefices; and that, as the three first fellows appointed by the Charter were laymen, the fellowships which they held ought to be considered as indelibly stamped with the character of lay fellowships, and could not, upon vacancies, be filled up by any but laymen.

It must be admitted that a substantial difference was intended to be ultimately established between the clerical and the lay fellows.

In contemplation of the college being full, the Charter and Statutes provided that two of the sixteen fellows should be clergymen or clerical fellows, announced to be such from the time of their election: they were to be resident; they might continue fellows for life; and they were relied on to execute the duties of certain
 offices,

offices, and to superintend the education of the undergraduates. The other fellows were to be lay fellows, announced to be such from the time of their election: they were not tied to residence; they were to hold their fellowships only for twelve years, and were not relied on to execute the duties of the college offices.

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If all the fellowships were full, if there were two clerical fellows, and fourteen lay fellows, and a vacancy should then happen, it must be filled up by a fellow of the same character with him who made the vacancy, whether clerical or lay; but the question in this case has reference to the intermediate time, between the first foundation, evidenced by the Charter and Statutes, and the intended completion of the college by the appointment of all the fellows.

It is scarcely doubted but that the corporation, constituted by the Charter, had a power of continuing itself by the election of new fellows, upon vacancies; and the question is, whether such new fellows, to the extent limited by the Charter, might not be clerical. And I can find no sufficient reason for thinking they might not, or that the fellowships filled up by the Charter were indelibly stamped with the character of lay fellowships.

The expressions, "clerical fellowships," and "lay fellowships," are first used in pages 21. and 23. of the Charter, and there plainly refer to the passage in page 11., which speaks of the fellowships to be held by fellows who are in holy orders, or laymen, respectively. There are other subsequent passages both in the Charter and in the Statutes, on which the conclusion as to the distinct characters of the clerical and lay fellowships is founded. But the Charter does not give any distinct character to the fellows thereby appointed, or give any specific directions as to the mode in which vacancies in those

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those particular fellowships are to be filled up. The particular persons appointed were, indeed, laymen; but they were not, as they might have been, called three of the lay fellows: they were not announced to be lay fellows in any way whatever, and, of course, not in the way required upon the election of lay fellows (p. 50.); and they might have entered into holy orders at any time. If they had done so, and a vacancy had occurred, the electors (p. 21.) might not have been justified in filling it by a clergyman, or making a clerical fellow. But supposing the continuing fellows to be laymen, I see no reason to think that the electors might not choose a clergyman, and if they so pleased, call him a clerical fellow. It was contended that to do so would be an usurpation upon the Crown; for, as the clerical fellows might continue for life, and the lay fellows for only twelve years, as the permanent fellowships must be more valuable than the temporary, and the Crown appointed only laymen holding temporary fellowships, and reserved to itself all the others, it must be concluded that among the reserved fellowships were the two clerical or permanent fellowships. This argument, however, rests altogether on the assumption that it was intended to affix a permanent character to the fellowships filled up by the Crown in the first instance; and, finding no sufficient evidence of such intention, I cannot coincide with the argument; nor does it appear to me probable that, if it had been meant to reserve to the Crown the appointment of the two clerical fellows, no distinct provision for that purpose would have been made.

On the whole, I am of opinion that in the year 1824 it was lawful for the Master, professors, and two continuing fellows to elect a gentleman about to become a clergyman, and whom they called a clerical fellow, in the room of a layman, whose fellowship was vacated by the expiration of twelve years; that in the year 1836, it

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was lawful for the two Archbishops and the Master of *St. John's College* and *Clare Hall*, to elect a clerical fellow into the office of Master; and that, under these circumstances, Mr. *Worsley* is now legally Master of the college.

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The LORD CHANCELLOR.

I feel much indebted to his Lordship, the Master of the Rolls, and to his Honor the Vice-Chancellor, for the assistance they have afforded me in this case. I was induced to request that assistance, from finding myself in the peculiar situation of having, in the first place, to decide on the validity of Mr. *Worsley's* title, as Master of *Downing College*; and, then, in the event of my being of opinion that his election had not been good, having the duty thrown upon me, of appointing to the vacant office.

Two points were principally insisted upon in the argument, as impeaching Mr. *Worsley's* title; the first of which was that, as a clergyman, he was not eligible to the office of Master. Now, there are, throughout the Charter, and throughout the Statutes, various passages, and various provisions which seem to imply, that the authors of those instruments did not contemplate that the Master would be a clergyman. When, however, I look to the definition of the qualifications, which were necessary to entitle the party to be a candidate for the office of Master, I find only that he should be possessed of other qualifications: one of these was, that he should be or have been a fellow; and of the fellows, two were by the constitution of the college to be clerical fellows. There is nothing, therefore, to exclude a clergyman, or to exclude a clerical fellow, in terms, from being eligible to the office of Master; and, on that part of the case I did,

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did, not throughout the argument, feel, nor have I since felt any considerable doubt.

On the other part of the case, I have certainly felt very considerable doubt; namely, how far it was proper, upon the vacancy occurring which gave rise to the election of Mr. *Worsley* as a fellow, to do that which the college attempted to do, namely, constitute him a clerical fellow: and I am disposed to think that if the distinction between clerical and lay fellows existed at that time, before the completion of the college, no clerical fellow ought to have been appointed until the Crown had filled up the remaining thirteen fellowships.

The Scheme, in terms, proposed to appoint Serjeant *Lens*, Mr. *Meek*, and Mr. *Frere*, first lay fellows. The Charter says that the Scheme had been approved of. It appoints Serjeant *Lens*, Mr. *Meek*, and Mr. *Frere*, and such other thirteen persons as the Crown shall name, to be the first fellows; and it provides, that of the sixteen to be so appointed, two shall be in holy orders: but it does not describe the three fellows first appointed as lay fellows, although the Scheme had proposed they should be so described. It then provides, that the future fellows, except those to be first named as aforesaid, that is, except the three, and the thirteen to be afterwards named, apparently not contemplating any intermediate vacancies, shall be elected in the manner prescribed; and it proceeds to declare the qualifications for clerical and lay fellows, and the duration of their respective offices; throughout, however, appearing to refer to fellows to be elected after the full number should have been completed: and it expressly provides, that the persons named shall be a corporation, for the purposes mentioned; and that the thirteen other fellows shall not be named until the buildings shall have been completed.

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By the Statutes, many of the regulations are postponed in operation, until the buildings shall have been completed: the scholars are not to be elected till then; the Master's duty of residence does not commence till then; and the same as to the professors' residence. The 5th statute relates to the election of fellows; and it prescribes the qualifications for clerical and lay fellowships, and the duration of the fellowships. It provides for the mode of declaring the vacancy, whether of a clerical or lay fellow: it refers to the previous rules for the election of scholars, which were not to take effect until after the buildings were completed; and it declares that the regulations respecting the election of fellows, and the period of commencement and determination of their fellowships, shall not be in force till after the erection of the buildings, and the nomination of the remaining thirteen fellows; but that, after that time, the regulations respecting the determination of fellowships shall apply to the fellows then or before that time elected or nominated, as well as to those who shall be elected in all future times. This appears to be the only passage, which alludes to the election or nomination of fellows, during the period between the date of the Charter and the completion of the buildings; and both the Charter and the Statutes are silent as to the mode in which intermediate vacancies are to be filled; but the Statutes, in terms, and the Charter, by necessary implication, confine all the rules and regulations with respect to the qualification of fellows, and the mode of electing them, to such vacancies only as may occur after the completion of the College and the appointment of the whole sixteen fellows by the Crown.

As the Master, professors, and three fellows first appointed, were, in the mean time, to constitute a corporation, the power of keeping up their number, and

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thereby preserving the existence of the corporation, must be implied; but where is the necessity of importing, into elections for this purpose, all or any of the qualifications and rules which were, in terms, confined to elections to take place after the completion of the College? If, however, the distinction between clerical and lay fellows was intended to exist before the completion of the College, the power of renewing their body ought, it would seem, to be confined to electing persons of the same character as those who had created the vacancy; and it was, therefore, an exceeding of their power to convert a lay into a clerical fellowship. But if, on the other hand, this distinction was not intended to exist at this period, then the attempt was merely inoperative; and Mr. *Worsley*, being in fact a fellow, was entitled to hold that office, and with it the eligibility to the office of Master, and that without reference to the question as to whether he was a clerical or a lay fellow.

It seems, indeed, that the rules, as applicable to clerical and lay fellows, were considered to apply not only to fellows elected before the College was completed, but to those originally appointed; and lay fellowships were therefore considered as not continuing beyond twelve years; and yet the Statutes, in terms, provide that the rules respecting the determination of fellowships, as well in the case of fellows before elected or nominated, as of those afterwards elected or nominated, shall not take effect until after the completion of the College.

The provisions of the Charter and the Statutes, as to the state and power of the corporation, before the completion of the College, are extremely defective; but I strongly incline to think that the true construction is,
 that,

that, in the absence of any provision for that purpose, the corporation possessed the implied power of renewing its members, as they were originally constituted; and that, without the restrictions and regulations prescribed in elections to take place after the corporation should have been completed. This construction would make Mr. *Worsley's* title as a fellow, generally, good, and his qualification as a candidate for the Mastership complete. The regulations as to the election of the Master were certainly to take place before the completion of the College; the regulations as to his residence alone being postponed until after that time. I cannot hold that Mr. *Worsley* is not Master, without holding that he has never been a fellow, although he has enjoyed his fellowship since the year 1824; and I cannot hold his election to be void, without holding that the rules and regulations in the Charter and Statutes, as to the election of fellows, apply to elections taking place before the completion of the College, which I am not prepared to do.

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The cases which have been referred to, as to the period within which the validity of elections to offices in municipal corporations can be questioned, though not binding in the present case, afford a strong analogy to regulate the discretion of a Visitor. In the exercise of that discretion, and in conformity with the opinion I have expressed upon the points on which Mr. *Worsley's* title to the Mastership of *Downing College* has been impeached, I am bound to declare his election good. The case, however, is one of considerable doubt, upon the instruments which constitute the title, and I think it is very reasonable, therefore, that the same course, with respect to the costs, should be adopted here, which was adopted in the *Queen's College Case*. (a)

(a) 5 Russ. 64.

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WOOD v. COX.

A testatrix, by her will, bequeathed all her personal estate to *C.*, whom she appointed one of her executors, for his own use and benefit for ever, trusting and wholly confiding in his honour, that he would act in strict conformity with her wishes. Afterwards, on the same day, she executed a testamentary paper, which contained a list of a number of persons by name, and among others, the name of the person who was her sole next of kin, with the several sums to be given to them respectively, and concluded with a declaration that such was the testatrix's wish :

THE will of *Sarah Crompton*, dated the 25th of *April* 1833, so far as is material, was in the following words: — “ I hereby devise, give, and bequeath all my house in *Bryanstone Square*, and all the furniture, jewels, plate, and effects therein, and also all my monies whatsoever, and all my estate, property, and effects whatsoever and wheresoever, both real and personal, and of whatsoever nature or kind the same may be, unto *Sir George Matthias Cox*, Bart. [and *Thomas Wilson* their] his heirs, executors, administrators, and assigns, for his and their own use and benefit for ever, trusting and wholly confiding in his honour, that he will act in strict conformity with my wishes. I hereby appoint the said *Sir George Cox*, and *Thomas Wilson*, solicitor, the executors of this will, and hereby revoke all former wills.”

On the same day the testatrix dictated another testamentary paper, which, was as follows : —

“ *Miss Mary* and *Miss Betsey Trussell*, for life, 100*l.* a year to be equally divided between them. *Mr. James Jones*, 50*l.* per annum for life.

“ *Miss Clements*, 100*l.*, as a present.

“ My cousins, the children of *James Heald* of *Chelmsford*, a Quaker, 20*l.* to each of his children.

“ *Old Mrs. Sarah Jones*, 10*l.* per annum for life ; and
after

Held, upon appeal, that *C.* took the personal estate for his own use, absolutely, subject only to the payment of the legacies specified in the testamentary paper, and three other sums, which, by his answer, *C.* admitted that the testatrix had directed him, and which he submitted, to pay.

after her death, to her daughter, and after her death, to her (the daughter's) daughter.

"*Elizabeth and Lydia Wood*, daughters of *Joseph Wood*, 50*l.* a piece.

"*Hannah Wood*, widow, 100*l.*

"*Daniel Wood*, her father, 100*l.*

"*Mr. Curtis*, 50*l.* per annum for life.

"*Miss Cordelia Jane Clode*, 20*l.*

"*My coachman*, 100*l.*

"*Mary Kite*, 100*l.*

"*Jones*, 20*l.* and his mourning to the late *Mr. Clifton*.

"*Fanny Eales*, 20*l.*

"*The cook*, 20*l.*

"*My wardrobe to Lady Cox and Miss Trussell*.

"*Mr. Thomas Wilson*, 200*l.*

"*To the poor of St. Mary's*, 25*l.*

"*The Clergyman*, 25*l.*

"*Such is the wish of Sarah Crompton.*"

Of this paper the last clause only, "*Such is the wish of Sarah Crompton,*" was in the testatrix's own handwriting.

The words in the will printed within brackets, "*and Thomas Wilson their,*" were directed by the testatrix to be struck out, and a line was accordingly drawn through them in the original; and they formed no part of the will, as proved. The death of the testatrix took place three days after the execution of her will; and probate of the will and testamentary paper was thereupon granted to the executors.

Daniel Wood, the person to whose name, in the testamentary paper, the sum of 100*l.* appeared annexed, was the testatrix's uncle, and sole next of kin; and, in the latter character, he filed the bill against the executors,

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claiming the residuary personal estate, as being undisposed of.

The Defendant, *Sir George Cox*, by his answer, stated his belief that the testatrix intended the testamentary paper solely for his private information and guidance, in the disposal of the property she had bequeathed to him, and not by way of codicil, or instructions for a codicil. His answer further stated that the testamentary paper was drawn up, in consequence of the testatrix having previously expressed her wishes to him verbally, and of his having requested that the particulars thereof might, for greater certainty, be reduced to writing: that in the evening of the 25th of *April*, after the testatrix had dictated and signed the testamentary paper, she stated to him, that she had forgotten to include *Mr. Thorn* in the list; and she then verbally directed the Defendant to give 500*l.* to *Samuel Thorn* of *Chelmsford*, after her death, and the sum of 100*l.* to *Dr. Sayer*, her medical attendant, and the like sum of 100*l.* to *John Varley*. The Defendant then, by his answer, after saying that he was ready and willing to pay these three several sums, according to the testatrix's direction, if he could do so with safety, went on to state that, after the testatrix had made her will, she spoke to the Defendant respecting the probable amount of the proceeds of the sale of the house in which she then resided, which she estimated, upon that occasion, at 11,000*l.*, adding that, after payment of her debts, legacies, and expenses, there would be something handsome left for the Defendant—at least 3000*l.* And the Defendant, by his answer, insisted, that the residuary personal estate of the testatrix belonged to him, for his own absolute use and benefit, as her residuary legatee, and that there was no resulting trust in favour of her next of kin.

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The facts stated in the answer, relative to the three sums of 500*l.*, 100*l.*, and 100*l.*, were subsequently found, upon a reference, and an order was made for payment of them to the persons entitled to them respectively.

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The cause afterwards came on at the Rolls, for further directions; and the sole question then made was, whether the Plaintiff, as the testatrix's next of kin, was beneficially entitled to the residuary personal estate, after paying the debts, funeral expenses and legacies, and the three sums mentioned in the Defendant's answer; or whether the residue, subject to those charges, belonged to the Defendant Sir *George Cox*, for his own use, absolutely.

The MASTER of the ROLLS, decided that Sir *George Cox* was a trustee of the residue for the Plaintiff (a); and an appeal was now brought from his Lordship's decision.

Mr. Knight, Mr. *James Russell*, and Mr. *Williamson*, for the appeal.

Mr. *Wigram*, Mr. *Richards*, and Mr. *Bigg*, in support of the decree.

The arguments on both sides were substantially the same as those relied upon in the court below. In the course of the discussion, the following cases were cited and commented upon;—*Rogers v. Rogers* (b), *Hill v. The Bishop of London* (c), *Barrow v. Greenough* (d), *Morice v. The Bishop of Durham* (e), *Wilson v. Major* (g),
Walton

(a) 1 *Keen*, 517. where the argument and judgment in the Court below are fully reported.

(b) 5 *P. Wms.* 195., and *Ca. T. T.* 268.

(c) 1 *Atk.* 618.

(d) 5 *Ves.* 152.

(e) 10 *Ves.* 522.

(g) 11 *Ves.* 305.

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Walton v. Walton (a), Dawson v. Clark (b), King v. Denison (c), Southouse v. Bate (d), Fowler v. Garlike (e), Eade v. Eade (g), Curtis v. Rippon (h), Horwood v. West (i), Sale v. Moore (k), Meredith v. Heneage (l), Benson v. Whittam (m), Podmore v. Gunning (n), Hoy v. Master (o), Cook v. Hutchinson. (p)

Aug. 30.

The LORD CHANCELLOR.

The testatrix, by her will, dated the 25th of *April* 1833, devised, gave, and bequeathed all her house in *Bryanstone Square*, and all the furniture, jewels, plate, and effects therein, and also all her monies whatsoever, and all her estate, property, and effects whatsoever and wheresoever, both real and personal, and of whatsoever nature or kind the same might be, unto Sir *George Matthias Cox*, his heirs, executors, administrators, and assigns, for his and their own use and benefit for ever, trusting and wholly confiding in his honour, that he would act in strict conformity with her wishes; and she thereby appointed the said Sir *George Cox* and *Thomas Wilson*, solicitor, the executors of her will, and thereby revoked all former wills.

Another paper, of which probate was granted, is without date; but the bill states, and the answer admits, that it was written on the same 25th of *April* 1833; and the particular

(a) 14 *Ves.* 313.(b) 15 *Ves.* 409., and 18 *Ves.*

247.

(c) 1 *Ves. & B.* 260.(d) 2 *Ves. & B.* 396.(e) 1 *Russ. & Mylne*, 252.(g) 5 *Mad.* 118.(h) 5 *Mad.* 434.(i) 1 *S. & Stu.* 387.(k) 1 *Sim.* 534.(l) 1 *Sim.* 542.(m) 5 *Sim.* 22.(n) 5 *Sim.* 485., & 7 *Sim.* 644.(o) 6 *Sim.* 568.(p) 1 *Keen*, 42.

particular language of this paper seems to me to be material, especially as one important word of it appears to have been misapprehended in the discussion at the Rolls.

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This paper was as follows ; — [His Lordship read the whole of the paper, ending with the words, “ such is the wish of *Sarah Crompton*,” and then continued : —]

The word “ wish,” in the sentence just read, appears to have been mistaken at the Rolls, and to have been supposed to be “ will ;” a difference which is so far important as the word “ wish ” corresponds with the same word used in the prior testamentary paper. In the first, the testatrix expresses her confidence that Sir *George Cox* will act in conformity with her wishes ; and in the latter, she expresses what her wishes are. It is also to be observed, that there are no words of gift throughout this testamentary paper ; a circumstance which, coupled with the repetition of the word “ wish,” affords an inference, deducible from the documents themselves, that the latter was merely an enumeration, in writing, of those wishes which the former assumes to have been previously communicated to Sir *George Cox*, as is stated in his answer to have been the case.

Taking then these two papers together, they amount to this : — The testatrix gives all her property to Sir *George Cox*, for his own use and benefit, trusting that he will execute her wishes ; such wishes being, that the several persons named in the second paper should have the several provisions therein specified. How does this differ from a gift of her property to Sir *George Cox*, subject to the payment of such several provisions ? If the word “ wish,” in the second paper, is to be considered as in connection with the same word in the first paper,
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the construction must be the same as if she had commenced the second paper in these words: — “The wishes referred to in the preceding writing, are that Miss *Mary* and Miss *Betsey Trussell* should have 100*l.* a year for life;” — and so on, through the several other gifts; and if such had been the form of the second paper, no doubt could, I conceive, have been entertained of the construction. The construction must have been the same as if the expression of the wishes had been contained in the first paper, which would have been a gift of the property to Sir *George Cox*, for his own use and benefit, subject to the several payments to the several persons enumerated. There would have been no inconsistency in any of these dispositions, no repugnancy in any of the clauses, no forced construction to be adopted, and no words to be omitted; whereas, before any construction can be adopted, making Sir *George Cox* a trustee of the whole property, the words “for his own use and benefit” must be expunged from the will, or, by reason of some irresistible evidence, derived from other parts of the testamentary disposition, treated as if they had never been inserted; a construction which nothing but absolute necessity would justify.

It was argued that the original of the first paper proved, that Mr. *Wilson* was at first intended to be associated with Sir *George Cox* in the gift of the property, Mr. *Wilson's* name having been inserted after that of Sir *George Cox*, and the word “their” for “his” heirs; and his name being afterwards erased, and the word “his” substituted for “their;” and that such intended gift to the two was inconsistent with the intention of giving a benefit to the one. Assuming that these erased words may be looked at, for the purpose of construing those of which probate has been granted, it appears to me that the consideration
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of them would lead to an opposite conclusion. In the first place, the erasure of Mr. *Wilson's* name appears to have taken place before the sentence was concluded; the latter part of it "trusting to *his* honour" must have been written after the erasure of Mr. *Wilson's* name, which, clearly, therefore, must have been inserted by mistake. But if Sir *George Cox* was to be only a trustee for others, why was Mr. *Wilson*, who is a co-executor, not to be associated with him in the trust? There could be no reason for this, if the trust was to apply to the whole property; but it was necessary, if the gift was intended to confer a benefit upon Sir *George Cox*, subject only to a trust to the extent of the specified provisions for others. If, in the language of some of the cases to which I shall presently refer, it was a gift upon trust, why exclude one of the executors from the trust? If, however, it was a gift subject to a charge, the reason is obvious. The testatrix, having communicated her wishes to Sir *George Cox*, probably considered that the performance of them was as effectually secured as if she had expressed them in her will; and the question, as to what precatory words amount to a trust, would not probably have been thought by her material to be considered, if she had been aware of the decisions upon that subject.

It was said that the testatrix need not have trusted to the honour of Sir *George Cox*, if she had intended to give to him the beneficial interest, subject to the payment of the legacies enumerated. But neither need she so have trusted, if she intended that he should be a trustee of the whole. The fact seems to be, that she considered her confidence in the honour of Sir *George Cox* just as well founded, and the interest of the legatees as secure, as if she had, in the first instance, done

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done what she afterwards did, namely, specify the legacies.

It was argued that the words "trusting and wholly confiding in his honour, that he will act in strict conformity with my wishes," prove that the testatrix did not use the words "for his own use and benefit" in an absolute and unrestricted sense. Certainly she did not use these words in their absolute and unrestricted sense, as to the whole of her property, namely, as to that part which would be required to pay the legacies given to others, or, in other words, to execute her wishes. But is there any thing unusual or inaccurate in a gift of property to an individual, for his own use and benefit, subject to the payment of an annuity, or other provision for another; and yet the observation would apply with equal force to such a gift? Assuming, however, that these words are inapplicable to so much of the property as would be required to provide for the execution of the testatrix's wishes, as expressed, can that be a sufficient reason for rejecting them altogether, when they are strictly and correctly applicable to so much of the property as was not required for those purposes?

It was then asked, if these words cannot be applied to the whole of the property, by what rule can it be ascertained to what part they do, and to what part they do not apply? The answer seems obvious: they must apply to all the property as to which the testatrix did not express any other wish. Every gift of a residue, for the benefit of the residuary legatee, is subject to the payment of other legacies and prior charges, which frequently exhaust the whole.

It was said further, that the second paper only expresses the testatrix's wishes *pro tanto*, it appearing from

from the answer of Sir *George Cox*, that she had afterwards mentioned other legacies which she wished to have paid. If the answer be to be looked at for this purpose, the whole statement must be taken together; and the statement there made is, that she, in the evening of the same day, mentioned to him that she had forgotten to include in the list certain legacies she wished to have paid, and that after payment of her debts and legacies there would be something handsome for Sir *George Cox*. In my consideration of the claims of the parties in this case, I wholly reject this statement in the answer; but then I do not think that it can properly be relied upon for the purpose of showing, that the testatrix intended to treat the whole of the property given to Sir *George Cox* as a trust, because subject to the future expression of her wishes. It was undoubtedly subject to any other disposition she might make of it, as every residuary gift is; but the question is, to whom was that portion of it to belong, which was not otherwise disposed of.

I have in this case, as I do in every case in which I have the misfortune to differ from the Master of the Rolls, felt every disposition to doubt the correctness of the several steps of reasoning by which I have come to a different conclusion. But when I find one construction which makes every part of the testamentary disposition consistent, and which is consistent with every circumstance connected with it, I cannot feel justified in adopting another, which creates an intestacy as to the residue, which requires striking out of the will certain expressions of ordinary use, and of well known meaning, and which would leave unexplained several other provisions appearing upon the face of the testamentary papers.

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In cases of this kind little assistance is to be derived from former decisions; but what is said by Lord *Hardwicke*, in *Hill v. The Bishop of London* (a), and by Sir *William Grant*, in *Walton v. Walton* (b), and Lord *Eldon's* decision in *Dawson v. Clarke* (c) (proceeding, as it appears to have done, upon the terms of the gift, and not upon the claim of the executor as such) and in *King v. Denison* (d), which was a stronger case in favour of a resulting trust than the present, would have confirmed me in the opinion I have formed, had I felt more doubt upon the particular circumstances of this case.

Adopting the distinction expressed by Lord *Eldon*, in the cases referred to, I am of opinion that this is not a gift upon trust, but a gift subject to a charge, and that Sir *George Cox* is therefore entitled to the property, subject to the legacies given by the testatrix, including those verbally given, as found by the Master's report.

Judgment reversed.

(a) 1 *Atk.* 618.

(b) 12 *Ves.* 318.

(c) 18 *Ves.* 247.

(d) 1 *Ves. & B.* 260.

1887.

MIREHOUSE v. SCAIFE.

June 26.
July 4.
Nov. 25.

THE will of *John Brockbank*, yeoman, which bore date the 21st of *October 1833*, and was duly executed and attested to pass freehold estates by devise, was, so far as is material, in the following words:—
“First, I give and bequeath unto my cousin *William Perry*, the sum of 100*l.*; unto my cousin *Nancy Carter*, 50*l.*; unto my cousin *Mary Cape*, widow of the late *John Cape*, 50*l.*; unto my cousins *Robert Scaife*, *Isabella Scaife*, and *Mrs. Jane Mirehouse*, the sum of 200*l.*, share and share alike, or the whole to the survivors at my decease. Also I give unto *Robert Scaife* all my interest in the brig *Solon*; unto *Hannah Leathwaite*, my servant woman, 10*l.*; unto *James Brockbank*, my godson, the son of *John Brockbank of Chapples*, I give and bequeath one field, known by the name of *Gillfoot*, as a memorandum, to be by him enjoyed at my decease. It is my will that all my debts, and all the above legacies, be paid and discharged within six months after my decease; and all the rest and residue of my estate, both real and personal, lands, messuages, and tenements, I give unto *Mary Newton*, the wife of *George Newton of Green*, by her freely to be possessed at my decease; and I do hereby constitute and appoint *John Brockbank of Chapples*, and *Robert Scaife of Maryport*, to be the executors of and to this my last will and testament.”

A testator, after bequeathing a number of pecuniary legacies to different persons, and giving a certain field to his godson, directed that all his debts and the above legacies, should be paid and discharged within six months after his decease; and all the rest and residue of his estate, both real and personal, he gave to *N.* The personal estate proving insufficient to pay the debts and legacies, it was held, upon demurrer to a bill by some of the legatees, seeking to charge their legacies on the real estate which passed under

The
the residuary devise to *N.*,

First, that there was no equity, in favour of pecuniary legatees, to have the assets marshalled, so as to throw the debts upon the real estate devised to *N.*; but,
Secondly, that both the debts and legacies were, by the words of the will, effectually charged upon that estate.

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The testator died in the month of *February* 1836, and the executors proved his will. The bill was filed by *Jane Mirehouse*, and *Mary Cape*, two of the legatees named in the will, against *Scaife* and *Brockbank*, the executors, against *Mary Newton*, the residuary devisee, and her husband, and against *William Perry*, who was the testator's heir at law. *James Brockbank*, the devisee of *Gillfoot*, was not made a defendant.

The bill alleged that the testator's personal estate was insufficient to pay his debts and funeral and testamentary expenses and legacies; but that the real estates devised to *Mary Newton* were more than sufficient for those purposes. The bill prayed a declaration that, according to the true construction of the will, the testator's debts and legacies were a charge upon his real estates thereby devised to *Mary Newton*; and, in case, on taking the accounts, his personal estate should prove insufficient to pay such debts and legacies, then that the deficiency might be raised by sale or mortgage of such real estates; or, if the Court should be of opinion that the testator's real estates were not charged with the legacies, then that his assets might be marshalled, and that the amount of the personal estate which should have been applied in payment of his debts, or so much thereof as should be sufficient for payment of the legacies, might be raised by sale or mortgage of the said real estates, and applied in payment of the legacies.

To this bill, *George Newton* and *Mary* his wife filed a general demurrer, which the Vice-Chancellor, upon argument, over-ruled, and the present appeal was then brought from his Honor's decision.

Mr. Jacob and *Mr. Booth*, for the Appellants, made two points; first, that equity would not marshal the assets, in favour of pecuniary legatees, against a devisee of

of a real estate, whether given specifically, or in the form of residue, every devise of land being in fact specific: and secondly, that the words to be found in this will were not strong enough to charge the testator's legacies upon the lands devised to *Mary Newton*.

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In support of the first proposition, the following authorities were cited;—*Forrester v. Lord Leigh* (a), *Scott v. Scott* (b), *Nannock v. Horton* (c), *Milnes v. Slater* (d), *Hill v. Cock* (e), *Keeling v. Brown* (g). The last of these cases, it was submitted, was on all fours with the case under appeal, and entirely concluded the question. Upon the second point (on which it was stated that the Appellants had the expressed opinion of the Vice-Chancellor in their favour, his Honor having decided against them on the other ground), reliance was placed on the direction that the debts and legacies should be paid within six months after the testator's decease, as exempting the case from the ordinary rule, and bringing it within the distinction taken by Sir *John Leach*, in *Douce v. Lady Torrington*. (h)

Mr. *Wigram* and Mr. *Walker*, *contra*, distinguished the cases cited for the Appellants, and with reference to the first point, relied strongly upon *Spong v. Spong* (i), in the House of Lords, and upon the language of Lord *Hardwicke* in *Hanby v. Roberts*. (k) They also mentioned *Clifton v. Burt* (l), and *Wythe v. Henniker*. (m)

They

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|--|---|
| (a) <i>Amb.</i> 171. | 1 <i>Keen</i> , 206., <i>Palmer v. Graves</i> , |
| (b) 1 <i>Eden</i> , 459. | 1 <i>Keen</i> , 545., and <i>Nysen v.</i> |
| (c) 7 <i>Ves.</i> 591. | <i>Gretton</i> , 2 <i>Y. & Coll.</i> 222. |
| (d) 8 <i>Ves.</i> 295. | (i) 1 <i>Y. & Jerv.</i> 300. 3 <i>Bligh</i> , |
| (e) 1 <i>Ves. & B.</i> 173. | 84. <i>N. S.</i> |
| (g) 5 <i>Ves.</i> 559. | (k) <i>Amb.</i> 127. 1 <i>Dick.</i> 104. |
| (h) 2 <i>Mylne & Keen</i> , 600. See | (l) 1 <i>P. Wms.</i> 679. |
| also <i>Brailhwaite v. Britain</i> , | (m) 2 <i>Mylne & Keen</i> , 635. |

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They observed, moreover, that, as the will was executed subsequently to the passing of the Act by which real estates are made assets for the payment of simple contract debts (a), and as every testator must be presumed to be cognizant of the law, and to make his will with reference to the state of that law, this testator knew that his debts were chargeable by statute on his real, as well as on his personal estate, and of course, therefore, when he made his will, meant that, in the event of the personalty proving insufficient to answer both his debts and legacies, the former should be thrown upon the real estate. In support of the proposition, that the words used in this will amounted to a charge of the legacies upon the real estate, the following cases were cited; — *Awbrey v. Middleton* (b), *Bench v. Biles* (c), *Clifford v. Lewis* (d), *Cole v. Turner* (e), *Withers v. Kennedy* (g).

Nov. 25.

The LORD CHANCELLOR.

• This was an appeal from an order of the Vice-Chancellor, over-ruling a demurrer. The question is, therefore, whether the bill states a case which entitles the Plaintiffs to any relief against the party demurring. The Plaintiffs are legatees of general pecuniary legacies. The Defendant who demurs is the devisee of the residue of the testator's real estate. [His Lordship read the material parts of the will, and proceeded:—]

The Plaintiffs, who are the two legatees, *Jane Mirehouse*, and *Mary Cape*, contend — first, that by this will the

(a) 3 & 4 W. 4. c. 104., which received the Royal assent on the 29th of August 1833.

(b) 4 Vin. Ab. 460. pl. 15.

(c) 4 Mad. 187.

(d) 6 Mad. 33.

(e) 4 Russ. 376.

(g) 2 Mylne & Keen, 607.

the residue of the testator's freehold estate, that is, the whole of his freehold estate except *James Brockbank's* interest in *Gillfoot*, is charged with the payment of his legacies; and secondly, if not, that they and the other legatees are entitled to have the assets marshalled, so as to throw the debts upon these devised estates, so far as may be necessary to leave enough of the personalty to pay the legacies.

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The Vice-Chancellor was of opinion against the Plaintiffs upon the first point, but in their favour on the second, and therefore overruled the demurrer. I concur with the Vice-Chancellor in thinking that the demurrer cannot be maintained; but as the two points raised are of much importance, and are not unlikely to arise in other cases, I think it right to make some observations upon both.

I will begin with the second point. The proposition contended for by the Plaintiffs is, that the rule, that pecuniary legatees are not entitled to have the assets marshalled against a devisee, is confined to specific devises of land, and that pecuniary legatees are so entitled against lands which pass under a residuary devise.

I will first consider the authorities, and then the reason of the rule, as I understand it.

The first authority relied upon in support of the marshalling, is a case put by Lord *Hardwicke*, in *Hanby v. Roberts*. (a) The case itself does not touch the present. The question there was between a general pecuniary legatee, and a legatee of 3000*l.* charged upon the real and

(a) *Amb.* 127. *S. C.* 1 *Dick.* 104. *nom. Hamly v. Fisher.*

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and personal estate, and a devisee of the land. The whole of the personal estate having been exhausted in payment of the 3000*l.* legacy, Lord *Hardwicke* held, that the general pecuniary legatee might come, *pro tanto*, upon the devised estate. This decision was founded upon a totally distinct rule in the marshalling of assets, a rule which had been acted upon in the prior cases of *Masters v. Masters* (a), and *Bligh v. The Earl of Darnley* (b), and was afterwards recognised by Lord *Eldon* in *Bonner v. Bonner* (c); but the passage relied upon in Lord *Hardwicke's* judgment is this, — “If one having land and personal estate makes his will, being indebted by specialty, and he gives specific legacies, and then gives the rest and residue of his real and personal estate; if creditors exhaust the personalty, the legatees may stand in their place and come upon the residuary devisee, because he has only the rest and residue. (d)” As this case is stated, it is not a case of marshalling at all. The specialty creditor was entitled to payment out of both funds; but he having taken payment out of that fund which was not primarily liable, the owner of that fund was to be reimbursed, out of the fund which, as between themselves, was primarily liable. This only means that, as between a specific legatee of personalty, and a residuary devisee of land, the land shall be first applied in payment of specialty debts, which is what Lord *Comper* had before said in *Long v. Short* (e); and it seems to be clear from the context, that Lord *Hardwicke* intended so to put it. His Lordship first puts the case as between general pecuniary legatees and the heir; then, as between general pecuniary legatees and a devisee, without making any distinction

(a) 1 *P. Wms.* 421.

(b) 2 *P. Wms.* 619.

(c) 13 *Ves.* 379.

(d) *Amb.* 129.

(e) 1 *P. Wms.* 403. See on this point *Haslewood v. Pope*, 5 *P. Wms.* 522., and *Forrester v. Lord Leigh*, *Amb.* 171.

distinction between a specific and a residuary devise; then, as between general pecuniary legatees, and specific legatees of personalty; and then, as between a specific legatee and a residuary devisee, which is the passage in question.

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It is only upon this construction, which adheres to the very words of the report, that the doctrine here laid down by Lord *Hardwicke* can be made consistent with his decision in *Forrester v. Lord Leigh (a)*, pronounced in the year 1753, that is, two years after *Hanby v. Roberts*. In that case the devise was of all the testator's real estate in several counties named, or elsewhere. Pecuniary legatees claimed to throw the specialty debts upon those estates; and it was urged that the devise was not specific: but Lord *Hardwicke* refused the relief, observing that every devise of land was specific, and assigning as his reason that personalty given by will fluctuates, but land does not, as no more passes than the testator had at the time of making his will.

Some expressions which fell from Sir *William Grant* in *Powell v. Robins (b)* have been supposed to support the claim to marshal in this case; but upon minutely examining that case it will, I think, be found to have no relation to it. That case was between simple contract creditors and a devisee, specialty creditors having exhausted the personalty; and there was no doubt about the marshalling: but the question was whether the testator had, by his will, charged his real estate with the payment of his simple contract debts, he having directed that all his debts should be paid by his executor. Sir *William Grant* there said the authorities determined, that the words used could not, of themselves, charge the real

(a) *Amb.* 171.

(b) 7 *Ves.* 209.

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real estate, supposing that no real estate passed to the executors; adverting, in this observation, to cases in which that circumstance had been the ground of the decision. It is, I think, obvious that the expressions of Sir *William Grant* now relied upon are to be referred to that point, and were used to distinguish the case before him from the cases alluded to, and were not intended to convey any opinion in favour of marshalling assets against a residuary devisee in favour of a pecuniary legatee, a question which was not before him. The Plaintiffs claiming to marshal in that case were creditors, and not legatees, and it appeared that there was no real estate except what was specifically devised.

The case of *Scott v. Scott* (a) is a very distinct authority against the claim to marshal. The devise in that case was of all the testator's real estate not before devised: specialty creditors had exhausted the personality; and legatees claimed a right to marshal. Lord *Henley*, however, held that they were not so entitled. It does not appear, from the report, whether the devise in *Herne v. Meyrick* (b) was specific or residuary; but though the distinction is taken between lands devised and lands descended, none is alluded to between lands devised specifically, and lands passing under a residuary clause. In *Clifton v. Burt* (c), the devise appears to have been specific; but Lord *Macclesfield* says, "every devise of land is as a specific legacy, and shall not be broken in upon, or made to contribute towards a pecuniary legacy."

The case of *Keeling v. Brown* (d), before Lord *Alvanley*, is directly in point against the claim to marshal,

(a) *Amb.* 383. and 1 *Eden*, 459.(c) 1 *P. Wms.* 679.(b) 1 *P. Wms.* 201.(d) 5 *Ves.* 359.

shal, and is in every respect very like the present. There was in that case no charge of legacies upon the lands: there were specific devises of particular lands; and there were also lands which passed under a residuary clause of "all the rest, residue, and remainder of the testator's estates and effects whatsoever, whether real or personal." The legatees claimed to have the assets marshalled, not against the land specifically devised, but against that which passed under the residuary clause, so that the attention of the Court was expressly drawn to the distinction. Another point, however, was raised, namely, whether the legacies were by the will charged upon the lands. Lord *Alvanley* decided that they were not; and then, adverting to the point of marshalling, says, "I cannot marshal the assets for the payment of the legacies;" and then, adds his Lordship, "I have formerly fully expressed my opinion upon this point, as to the difference between debts and legacies. I understand the Lord Chancellor expressed some doubt about it in the case of *Williams v. Chitty* (a), but upon reflection I still remain of the same opinion." This passage "I have formerly fully expressed," &c. has been supposed to refer to the question of marshalling; and from its position it would at first appear to do so. The error is, probably, in the report; but it is, I think, clear that it refers to the other question, before disposed of, namely, whether the will charged the legacies upon the land. Neither of the cases referred to have any thing to do with marshalling; and it is well known that Lord *Alvanley* and Lord *Rosslyn* differed as to what words would be sufficient to charge legacies upon land.

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(a) 3 Ves. 551.

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The case of *Aldrich v. Cooper* (a) was between creditors only and a devisee of copyhold, and does not appear to me to bear upon the present question.

It has been supposed, however, that the point has been set at rest by the decree in *Spong v. Spong*. (b) The case itself does not very closely apply to the present, as there was no question about marshalling; the only question being, between devisees, upon the construction of the will, as to whether part of the estate was not primarily liable, the whole being by the will made subject to the payment of the legacies. The testator, after devising some particular lands to one person, and giving certain legacies, charged and made liable all his real and personal estate, with the payment of his aforesaid legacies, and then gave to his son the residue of his real and personal estate, and appointed him executor. It had been held, in the Court of Exchequer, that the lands specifically devised, and those which passed under the residuary clause, were equally liable to the payment of the legacies, upon the principle that, as all devises of freehold were specific, there was no ground for any distinction. In the House of Lords, this was otherwise decided; and, so far, Lord *Eldon* and Lord *Redesdale*, who appear to have been consulted, would seem to have concurred: but it does not follow, that they concurred in all the reasons assigned by another peer in moving the judgment. The decision certainly proceeded upon a distinction between lands specifically devised and a residuary devise of lands, as to which should be primarily liable to a general charge created by the will, to which both were subject; and it is precisely the case put by Lord *Hardwicke* in *Hanby v. Roberts*, except that

(a) 8 Ves. 382.

(b) 1 Y. & Jer. 300. and 3 Bligh, 84. N. S.

that the case put by Lord *Hardwicke* is between a residuary devisee and a specific legatee; whereas *Spong v. Spong* is between a residuary devisee and a specific devisee. In neither was there any question of marshalling, but of priority of liability to the charge. Lord *Manners*, indeed, is made to say, "by the general rule, a specific devisee or specific legatee shall not contribute to make good a pecuniary legacy; but there can be no such rule applicable to a residue." It does not appear how this observation could apply to the case before the House, inasmuch as the will charged all the real estate with the legacy; and it does not appear, that it had any reference to a case of marshalling, although it might in its terms embrace that case. At most, it is only a *dictum*, which, if it was intended to apply to the case of marshalling, was not referable to any matter in judgment at the time.

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Such, as I understand them, is the state of the authorities. It is to be considered whether there be reason for the proposition, so often laid down, that in the sense in which the term must be understood for the purpose under consideration, every devise of land is to be considered as specific. The case put by Lord *Hardwicke* in *Hanby v. Roberts*, and the decision of the House of Lords in *Spong v. Spong*, do not determine that the devise of lands, as a residue, is not, in this sense, a specific devise; but that, upon the construction of the wills, and, according to the intention of the testators, in those cases, such devises were to be subject to the charges, in priority to the other property specifically given. If the distinction between specific and residuary devises is to be maintained, and the same terms are to be held to constitute a residuary devise of land, which amount to a residuary gift of personalty, it will be found that the right to marshal, by legatees, will arise in a very large

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large proportion of cases, as, for example, in devises of "all my real estate," "all my lands in *A. B.*, and elsewhere," &c. It cannot be necessary that the terms "rest and residue" should be used in the one case more than in the other.

When a testator gives the residue of his personal estate, he knows that it will be uncertain, till his death, what will be comprised in that gift. But it is certain that the gift will operate upon part only of what he may be possessed of at his death, all debts, funeral expenses, and other charges being to be paid out of it; and the expression necessarily imports what will remain, after all charges are defrayed. On the other hand, the testator knows precisely upon what real estate such a gift will operate, unless there be charges affecting the land beyond what the personal estate can satisfy.

If the term "residue" was used by this testator, with reference to what remained, after deducting *Gillfoot*, before given, the meaning and the construction must be the same as if he had first enumerated all his lands, and then had given *Gillfoot*, and then had devised all the rest of his enumerated lands. Beyond all doubt, that would have been as specific a devise of the rest, as of *Gillfoot*, or as if he had enumerated all the other parts. It would, indeed, have been so in the case of personalty. Upon this supposition, therefore, the land which passed under the residuary clause was strictly a specific devise; and, if so, it is admitted, that no case of marshalling can arise. The words "rest and residue of my real estate, lands, messuages, and tenements," must mean what the testator had at the time of making his will, deducting *Gillfoot*, or deducting some other matter or thing which would diminish the amount or value of the lands so possessed by him. The only matters

matters or things, referred to in the will, which could cause such diminution, are the debts and legacies which he had before directed to be paid. But if the terms "rest and residue" were used in that sense, they would, according to the authority of many cases, coupled with the direction to pay his debts and legacies, amount to a charge of such debts and legacies upon the land; and as the Plaintiffs would, in that case, have, in their own right, a title to be paid out of the real estate, after exhausting the personalty, the question of marshalling would be effectually excluded.

This view of the case opens the way to another consideration, namely, whether the terms of the will do not, according to the authorities, create a charge of debts and legacies upon the land. The testator gives several pecuniary legacies, and one specific legacy, and one field, — whether of inheritance or leasehold does not appear, except that no words of inheritance are used — and then he says, "It is my will that all my debts and all the above legacies be paid and discharged within six months after my decease; and all the rest and residue of my estate, both real and personal, lands, messuages, and tenements, I give unto *Mary Newton*, by her freely to be possessed at my decease." There is a direction that all his debts and legacies shall be paid, and then a devise of his real estate. This, in many cases, from *Stanger v. Tryon* (a), and *Kay v. Townsend* (b), down to *Clifford v. Lewis* (c), has been held sufficient to charge the lands; but there is also a devise of the rest and residue of the real estate, following a direction to pay debts and legacies, as
in

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|---|---|
| (a) 2 <i>Vern.</i> 709. <i>Railby's</i> note. | 49. <i>Douce v. Lady Torrington</i> , |
| (b) <i>Ibid.</i> in the note. | <i>Ibid.</i> 600. <i>Braithwaite v. Britain</i> , |
| (c) 6 <i>Mad.</i> 33. And see <i>Warren v. Davies</i> , 2 <i>Mylne & Keen</i> , | 1 <i>Keen</i> , 206. <i>Palmer v. Graves</i> , |
| | <i>Ibid.</i> 545. and <i>Ibid.</i> 567. note. |

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in *Hassel v. Hassel* (a), and in the cases put by Lord *Hardwicke* in *Brudenell v. Boughton*. (b) There is, moreover, a blending of the real and personal estate, and a gift of the residue of both, as in *Hassel v. Hassel*, *Bench v. Byles* (c), and *Cole v. Turner* (d), circumstances which relieve this case from the question discussed by Lord *Alvanley* and Lord *Rosslyn* in *Chitty v. Williams* (e), and *Keeling v. Brown* (g), as to whether words, admitted to be sufficient to charge lands with debts, ought to be held sufficient to charge them with legacies.

If, indeed, this charge were to be confined to debts, a new ground of marshalling would be opened, though not the ground upon which the Vice-Chancellor is said to have decided. To attribute different meanings to the same words in the same sentence, may sometimes be necessary; but nothing but necessity can justify it. When the testator spoke of "the rest and residue" of his personal estate, he certainly meant what would remain after payment of his debts and legacies. Is it not natural to suppose that he used those words in the same sense when applied to his real estate?

I cannot feel justified in departing from the rules established in the cases which preceded the 3 & 4 W. 4. c. 104., on account of the very beneficial provisions of that act. To do so would create great confusion and much uncertainty and litigation; and the provisions of that act can have no bearing upon the construction of a charge of legacies; and indeed, as to debts, a charge by the will is now inoperative, in consequence of that act.

It

- (a) 2 Dick. 527.
 (b) 2 Atk. 268.
 (c) 4 Mad. 187.

- (d) 4 Russ. 376.
 (e) 3 Ves. 545.
 (g) 5 Ves. 359.

not/sec
Bath v. Haring
4. Mylne & Craig
 289.

It is said that the direction to pay the debts and legacies was only intended to fix a time for the payment of them. That, no doubt, was part of the object: but that it was not the whole object, may be inferred from the gift, which follows, of the rest and residue of the real and personal estate, which the observation leaves untouched.

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If I were to allow the demurrer, I should be deciding that under this will *Mary Newton* was to enjoy all the testator's real estates, except *James Brockbank's* interest in *Gillfoot*, leaving all the legacies unpaid. This I am not prepared to do. I agree with the Vice-Chancellor in thinking that the demurrer must be over-ruled; but, not concurring in all the observations made by his Honor as to the two points upon which that question depends, I have thought it right to state, so far, the view I entertain upon the principles and authorities which have been brought under my consideration.

The appeal must be dismissed, but without costs. (a)

(a) The effect of a general or residuary devise of real estate, is materially altered by the recent statute for the amendment of the Law of Wills, 1 Vict. c. 26. By the third section of that statute it is (among other things) enacted, that the power thereby given of disposing of property by a will executed as therein required, shall extend to all such "real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently

to the execution of his will." And the twenty-fourth section of the same statute enacts, "that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." How far the doctrine of courts of equity, with respect to marshalling assets against residuary devisees, may be affected by these alterations, *quære*.

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Nov. 18.

TURNER v. HITCHON.

A cause may be set down for hearing in the cause-book of the same term in which publication has passed, provided it be not set down until after the last day of the term.

MR. *WIGRAM* and Mr. *Walker* renewed the motion, (which the Master of the Rolls had refused with costs (a)), that this cause might be struck out of the cause paper, on the ground that it had been set down to be heard in the cause-book of *Trinity* term, being the same term in which publication passed. They relied upon Lord *King's* order of the 9th of July 1725 (b), which expressly declared that no cause should be set down to be heard in the same term, in which publication had passed; and also upon the understanding, as to the practice, among the Six-Clerks, all of whom considered that the proceeding complained of was irregular.

The LORD CHANCELLOR said he entirely concurred in the opinion expressed by the Master of the Rolls. There was no contradiction or inconsistency between the order of Lord *King*, and the eighty-second of the New Orders. The Book of Causes, in which the cause in question was set down, though called, for the sake of convenience, the Cause-book of *Trinity* term, was in fact the Book of Causes for *Trinity* term, and the sittings after it. The cause of *Turner v. Hitchon*, instead of being set down to be heard in *Trinity* term, was set down to be heard in the course of the sittings during the subsequent vacation. There was no ground for the application; which must, therefore, be refused. (c)

(a) 1 *Keen*, 814.(c) *Partridge v. Cann*, 1 *Sim.*(b) *Beames's Orders*, p. 335.& *Stu.* 466.

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Dec. 6, 7, 8.
1837.
July 22.

EARLY in the year 1819, a marriage having been agreed upon between the Marquess of *Chandos* (then Earl *Temple*), the only son of the Duke (then the Marquess) On a treaty of marriage, carried on in *London*, between the only son of an *English*

Marquess and the daughter of a *Scotch* Earl, the terms of a marriage settlement were embodied in a paper, called "Proposals;" which paper was approved by the respective fathers, on behalf of their children. The Proposals stipulated that the Earl should pay or advance, as the portion of his daughter, certain sums of money, at the times, and in the manner therein specified; and that, in consideration of those sums and of the marriage, the Marquess and his son should concur in charging large estates in *England*, *Ireland*, and the *West Indies*, with certain provisions for the husband, during his father's life, and for the wife and the younger children of the marriage; and subject thereto, should settle the same estates upon the Marquess and his son, successively, for life, with remainders to the issue of the marriage, according to the series of limitations therein specified. The Proposals concluded with a proviso, that the settlement should contain the usual powers of appointing new trustees, the usual clause of indemnity to trustees, and all other usual and necessary clauses. A settlement was then prepared and executed in *London*, to which the intended husband and wife, with their respective fathers, and certain other persons, as trustees, were parties, and of which the provisions, though different in several particulars, were similar in their general character to the terms contained in the Proposals; and the marriage took effect. Many years afterwards, the Earl, who was a domiciled *Scotchman*, died, leaving a large personal estate; and a suit having been thereupon instituted in *Scotland*, in which all persons, who were competent to contest the question, intervened, it was adjudged by the Court of Session, and also, on appeal, by the House of Lords, that according to the law of *Scotland*, the daughter of the deceased Earl was entitled to a proportionate share of her father's personal estate, called, in that law, her legitim, inasmuch as she had not renounced that right by her marriage settlement, or otherwise. Very shortly before this decision of the Court of Session, the Proposals, which had been mislaid, were discovered; and the present bill was then filed against the husband and wife, alleging that the settlement had been prepared in pursuance, and on the basis, of the Proposals; that in *Scotland*, a clause barring legitim was a usual and necessary clause in the marriage settlement of a child for whom the father thereby advanced a portion; that the proviso in the Proposals was understood, by all the contracting parties, as applying to and comprising such a clause; that as no such clause was to be found in the settlement, as executed, the settlement did not effectuate the intention of the contract, as expressed in the Proposals; and that it was in this respect erroneous, and ought to be reformed. The bill prayed a declaration accordingly, and that, in the meantime, the Defendants might be restrained by injunction from proceeding to enforce the decree obtained in the *Scotch* Court for payment of the sum found due to the Defendants on account of the legitim. The Lord Chancellor dissolved the injunction, which had been granted by the Vice-Chancellor, and held,

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First, that the proviso was to be construed with reference to the subject-matter and objects of the settlement, which was in the *English* form, and applied exclusively to *English* subject-matter; and that a clause barring legitim, therefore, could not be considered as comprehended under it :

Secondly, that whereas the claim to legitim could only be barred by an express contract, between the

father and the daughter, to that effect, the father, in approving of the Proposals, was acting on behalf of his daughter, and not as a party dealing adversely with her, for the purchase or renunciation of her rights :

Thirdly, that there was no sufficient evidence to shew that the Proposals constituted the final contract of the parties, and had not been varied by some subsequent agreement, prior to the execution of the settlement.

The Court will not reform a settlement, on the ground of mistake, unless the evidence, as to the mistake, and as to the real intention of the parties, is perfectly clear and satisfactory.

Whether the Court would entertain such a suit, on the ground of the discovery of matter constituting a new case, after the subject of the suit had been adjudicated upon and disposed of by a foreign tribunal of competent jurisdiction, when it did not appear that the new matter might not still be made available before the foreign tribunal, according to the course of proceeding there, *quære*.

Marquess) of *Buckingham*, and the Lady *Mary Campbell*, the youngest daughter of the late Marquess (then the Earl) of *Breadalbane*, the arrangement of the terms upon which a settlement in contemplation of that event should be made, was referred, by the fathers of the respective parties, to the Rt. Hon. *Thomas Grenville*, and the Earl of *Lauderdale*, the former of whom represented the Duke of *Buckingham*, and the latter, the Marquess of *Breadalbane*.

The treaty which followed was carried on in *London*, where the respective families of the parties were then residing; and the conduct of it was left entirely to Mr. *Grenville* and Lord *Lauderdale*, who, in the course of the negotiations, caused certain terms, of which they jointly approved, to be drawn up in a paper called "A Sketch of the proposed Settlement," &c. This Sketch specified the several sums which, it was intended, should be paid or secured by Lord *Breadalbane* on the marriage of his daughter, and then proceeded to give an outline of the provisions which, in the opinion of the referees, were proper to be contained in the settlement, to be made by the Duke of *Buckingham*, of his real estates, on the marriage of his son, and of the various charges to be imposed on those estates, in favour of the intended wife, and the younger children of the marriage.

The

The Sketch, having been signed by Mr. *Grenville* and Lord *Lauderdale*, was transmitted to Mr. *Vizard*, an *English* solicitor resident in *London*, who was employed in the transaction as the solicitor and professional adviser of Lord *Breadalbane*; and the provisions which it contained were soon afterwards embodied by that gentleman, with some trifling variations, and in a more expanded form, in another paper, intituled "Proposals for a Settlement," &c. a copy of which was sent to Mr. *Robson*, the solicitor and agent of the Duke of *Buckingham* and the Marquess of *Chandos*, for their approval.

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The Proposals began by stating that three sums of 10,000*l.*, each, were to be advanced or secured by Lord *Breadalbane*, by way of portion for his daughter, on her marriage, and declaring the manner in which, and the times when, they were to be so advanced or secured respectively: they next stated the several terms of years which it was proposed to create out of the Duke of *Buckingham's* estates in the counties of *Bucks*, *Oxon*, *Warwick*, and *Hants*, and in *Ireland* and the *West Indies*, (the yearly income of which estates was stated to be 44,500*l.*,) for the purpose of providing an annuity of 5000*l.* for Lord *Chandos*, during the life of his father, and pin-money and a jointure for the intended wife, and certain allowances and portions for the younger children of the marriage, in the different events which might arise. They then proceeded to provide for the settlement of the same estates, subject to those trust terms, upon the Duke of *Buckingham* and Lord *Chandos*, successively, for their respective lives, with remainders to the first and other sons of the marriage, successively, in tail male, with divers remainders over. The proposals then went on to specify, in detail, the particular trusts upon which the several terms of years were to be held by the respective trustees, with a view to the

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various contingencies therein expressed and provided for; and, for that purpose, they reserved to the intended husband and wife certain powers of appointment, in different events, over the sums which were to be secured upon, or raised by means of the trust terms. The Proposals concluded in these words, — “the settlement to contain the usual powers of appointing new trustees, the usual clause of indemnity to trustees, and all other usual and necessary clauses.”

These proposals, having been submitted to the Duke of *Buckingham* and Lord *Breadalbane*, and approved of by them, subject to some variations, the precise nature of which did not appear, were subsequently returned to Mr. *Vizard*; under whose instructions a settlement was soon afterwards prepared by an eminent conveyancing counsel in *London*.

The settlement was dated the 11th of *May* 1819, and was made between the Duke of *Buckingham*, of the first part, the Marquess of *Chandos*, of the second part, the late Marquess of *Breadalbane*, of the third part, the Lady *Mary Campbell*, now the Marchioness of *Chandos*, of the fourth part, and the different trustees, of the fifth, sixth, and seventh parts, respectively; and it was duly executed by all parties. It recited, among other things, that, upon the treaty for the intended marriage, it was agreed that Lord *Breadalbane* should pay or secure the sum of 30,000*l.* as the portion or fortune of Lady *Mary Campbell*; of which the sum of 10,000*l.* was to be paid on or before the solemnization of the marriage, the further sum of 10,000*l.* at the expiration of eighteen calendar months after the marriage, with interest at 5 per cent. in the meantime, and the remaining 10,000*l.* within six calendar months after the death of Lord *Breadalbane*, with interest from the
day

day of his decease: that it was further agreed that the Duke of *Buckingham* should receive from Lord *Breadalbane* the two first-mentioned sums of 10,000*l.* and 10,000*l.*, with the interest upon the latter sum from the day of the solemnization of the marriage; and in consideration thereof should enter into the covenant thereafter contained, for the payment of the sum of 20,000*l.* within two years after the solemnization of the marriage, with interest for the same in the meantime; and that such sum of 20,000*l.*, and the interest thereof should be further secured in the manner thereafter expressed: and that it was agreed that the said sum of 20,000*l.*, so to be covenanted to be paid by the Duke of *Buckingham*, and the said sum of 10,000*l.*, the residue of the portion of 30,000*l.*, to be secured by the bond of Lord *Breadalbane*, and to be payable after his decease, and the several securities for the same, should be vested in the trustees therein named (parties thereto of the fifth part), upon the trusts thereafter declared: and that in further consideration of the intended marriage, and also of the portion or fortune of Lady *Mary Campbell*, the Duke of *Buckingham* and the Marquess of *Chandos* had proposed and agreed to settle and assure the several manors and estates, in the counties of *Buckingham*, *Oxford*, *Warwick*, and *Northampton*, in *England*, and in the counties of *Westmeath*, *Longford*, *Clare*, and *Queen's County* in *Ireland*, and in the island of *Jamaica*, respectively, thereafter particularly described, to the several uses, and upon and for the several trusts, intents, and purposes, and with, under, and subject to the several powers, provisoes, limitations, declarations, and agreements thereafter expressed.

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After these recitals, the settlement proceeded to create, out of the estates enumerated in the recitals, various terms of years, which were vested in trustees, in

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order to secure an annuity of 5000*l.* to Lord *Chandos*, during his father's life-time, as also pin-money and a jointure for his wife, and certain allowances and portions for the younger children of the marriage: it then went on to specify and declare particularly the trusts of the several terms, and to give to the trustees the powers necessary for the purposes contemplated, with reference to the different contingencies which were provided for; and, subject to those trusts, it limited the same estates to the Duke of *Buckingham*, and the Marquess of *Chandos*, successively, for life, with remainders to the first and other sons of the marriage, successively, in tail male, with divers remainders over.

The various trusts, provisions, and limitations contained in this settlement, differed in several particulars from those which had been specified in the Proposals; but in their general character and objects they were substantially the same. The estates in *Hampshire*, which, according to the Sketch and Proposals, had been proposed to be comprised in the settlement, were omitted; and the *Northamptonshire* estates were substituted in their place. No explanation was given of the reason for this alteration, or of the circumstances under which it was made.

On the 11th of *May* 1819, the day on which the settlement was executed, Lord *Breadalbane* also executed two bonds, one of which was to secure the payment, to the Duke of *Buckingham*, of the sum of 10,000*l.*, within eighteen months from the day of the marriage, and the other was to secure the payment, to the trustees named in the settlement, of a like sum of 10,000*l.*, at the expiration of six months from the day of his own decease, with interest from that day. The marriage took effect shortly after the execution of the settlement; and Lord

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Breadalbane paid the two sums of 10,000*l.*, each, which he had agreed to advance to the Duke of *Buckingham*, as part of his daughter's portion, at the respective times appointed by the settlement for that purpose.

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By certain trust dispositions, executed in the years 1823 and 1828, in the *Scotch* form, and which were in the nature of a will, Lord *Breadalbane* conveyed all his real estates in *Scotland*, of which he was seised in fee, and all his personal estate, after his own death, to Viscount *Maitland*, and certain other persons therein named, as trustees and executors, upon the trusts, and for the purposes declared in those dispositions, and in certain testamentary papers.

In the month of *October* 1831, the Lady *Elizabeth Campbell*, the other daughter of Lord *Breadalbane*, intermarried with Sir *John Pringle*. Upon her marriage, her father advanced a sum of 20,000*l.* by way of portion, and in the contract of marriage, executed on that occasion, a clause was inserted, declaring that the sum so advanced was to be in full satisfaction of all her claim to the provision known, in the law of *Scotland*, by the name of legitim. According to that law, the younger children of a father domiciled in *Scotland*, living at his death, are entitled, in equal shares, to one third of his personal estate, called the children's legitim, unless their right has been barred, either by a distinct provision to that effect in the marriage settlement of the father, or by a renunciation or release executed by the children.

The late Lord *Breadalbane* who was a domiciled *Scotchman* at the time of Lady *Chandos's* marriage, had himself married without any settlement being made upon his marriage. On the 29th of *March* 1834, he died, being

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entitled, at the time, to large real estates in *Scotland*, and also to personal property, to the amount of 400,000*l.* and upwards, which was chiefly situate in *England*. His widow, now the Dowager Marchioness of *Breadalbane*, survived him; and the present Marquess of *Breadalbane*, who was his only son and heir at law, and Lady *Elizabeth Pringle* and the Marchioness of *Chandos* were his only children and next of kin. Probate of his trust dispositions and testamentary papers was granted by the Prerogative Court of *Canterbury*, to Viscount *Maitland*. The debts, and funeral and testamentary expenses were paid by the trustees and executors; and one third of the clear surplus of the personal estate was invested by them, in their own names, in the *English* funds.

Shortly after the death of Lord *Breadalbane*, who had continued to be a domiciled *Scotchman* from the time of Lady *Chandos's* marriage, down to the period of his decease, various claims were made, by different parties, upon his trust estates, and, among others, a claim was made by Lord and Lady *Chandos*, in right of Lady *Chandos*, to a share of the personal estate, in respect of her legitim. On the 12th of *November* 1834, the acting trustees and executors under the trust dispositions, commenced an action of multiplepounding in the Court of Session in *Scotland* (a proceeding analogous to an interpleading suit in this Court), to which the Dowager Marchioness, and the present Marquess of *Breadalbane*, the Marquess and Marchioness of *Chandos*, and all other necessary parties were made Defendants, and of which one object was to obtain the decision of that Court upon the validity of the claim set up by Lord and Lady *Chandos*. On the 26th of *January* 1836, the Court of Session gave judgment in that suit (a), and thereby, among other things, found, that

(a) 14 *Shaw & Dunlop*, 309.; and see 15 *Shaw & Dunlop*, 48.

that the Marchioness of *Chandos* had not, by her contract of marriage, or otherwise, renounced her legitim; and that she was, therefore, entitled to make her claim for the same; and that, inasmuch as she was the only younger child of the late Lord *Breadalbane*, who had not renounced the right of legitim, her claim extended over one third part of her father's personal estate. An appeal against the judgment of the Court of Session was afterwards presented to the House of Lords.

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Pending that appeal, the Marquess of *Breadalbane*, who was the party prosecuting the appeal, filed the present bill against the Marquess and Marchioness of *Chandos*, and against the trustees and executors under his late father's testamentary dispositions.

The bill, after stating the transactions already mentioned with respect to the treaty of marriage between Lord and Lady *Chandos*, and the circumstances under which the settlement of *May* 1819 was prepared and executed, as well as the legal proceedings which had taken place in *Scotland*, after the death of the late Lord *Breadalbane*, relative to the question of Lady *Chandos's* title to legitim, went on to allege that the Sketch and Proposals before mentioned had come to the hands of the Plaintiff on the 5th of *January* 1836, only a few weeks before the decision of the Court of Session (*a*), having been discovered in consequence of a recent and diligent search among some old papers in the possession of Mr. *Vizard*. It charged that the Proposals were duly considered by the late Lord *Breadalbane* and by the Duke of *Buckingham*, and also by Lord and Lady *Chandos*, and were approved of by them; and that all those parties,

(*a*) The cause was at that time waiting for judgment, the Lord Ordinary having reported it to the second division of the Court, and the Judges having taken time to consider their decision.

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The bill further charged, that any person conversant with the laws of *Scotland*, and knowing that the late Lord *Breadalbane* was a domiciled *Scotchman*, would, upon reading the proviso, in the Proposals, for the insertion in the settlement of all other usual and necessary clauses, have known that a clause by which Lady *Chandos* should renounce her legitim, or accept the portion given her by her father in lieu of that right, was a usual and necessary clause: that the preparation of the settlement was left by all parties entirely to Mr. *Vizard*, on the supposition that all proper and necessary clauses, according to the Proposals, would be inserted therein; but that Mr. *Vizard*, who was an *English* solicitor, and not conversant with the law of *Scotland*, was not aware of the

the right of a child to legitim, according to that law : that Mr. *Vizard*, having received from Mr. *Robson* the proposals so approved, immediately caused the settlement of the 11th of *May* 1819 to be prepared, upon the basis and in execution of the Proposals; but that, owing to mistake or misapprehension, such settlement was not prepared in conformity with them.

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The bill further charged, by way of evidence of the late Lord *Breadalbane's* intention and understanding that the provision, made by him for Lady *Chandos*, should be in lieu of legitim, that in all the instruments executed by his Lordship, both prior and subsequently to the marriage of his younger children, in which he made provision for such younger children, he declared that the provision so made was in satisfaction of their right to legitim; and, in particular, that in three several bonds which he executed for that purpose, in the years 1794, 1798, and 1812, respectively, a declaration was inserted to that effect; and further, that in a bond executed by his Lordship in the year 1824, by which the sum of 10,000*l.*, payable, according to the settlement, six months after his death, was secured upon his *Scotch* property, a declaration was contained that such provision was in full of all legitim, which Lady *Chandos* could claim against his estate upon his decease.

The bill further charged, that in the before-mentioned proceedings carried on in the Court of Session in *Scotland*, that court, according to its own practice, and according to the laws of *Scotland*, was not competent to take into consideration the matters herein-before stated.

The bill prayed, in substance, a declaration, that according to the true construction of the settlement of the

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11th of May 1819, the sum of 30,000*l.* advanced by the late Lord *Breadalbane* on the marriage of Lady *Chandos*, was a satisfaction of her claim to legitim, and was accepted by Lord and Lady *Chandos* as such; and that Lord and Lady *Chandos*, by being parties to that settlement, had duly renounced or released all their right thereto: but if the Court should not be of that opinion, it then prayed, in the alternative, that the settlement might be reformed and amended, by inserting therein a proper clause, whereby Lord and Lady *Chandos* should renounce and release the right to legitim, or declare that the sum of 30,000*l.* was given to, and accepted by them, in lieu of that right; and that Lord and Lady *Chandos* might be restrained from availing themselves of the judgment in their favour, obtained in the Court of Session against the other Defendants, the trustees of the late Lord *Breadalbane*, and from doing any act to compel such trustees to pay over to them the amount of the legitim, or the funds in which the same was invested; and that the trustees might, in like manner, be restrained from paying over or transferring such funds to Lord and Lady *Chandos*.

The Defendants, the Marquess and Marchioness of *Chandos*, by their answer, among other things, said, that they did not know or believe that it was usual in *Scotland*, upon the marriage of a child, for the father to give such child a marriage portion in lieu of the right to legitim; for, they said they had been informed and believed that, in most cases, it was a matter of special contract and arrangement among the various contracting parties, what should and what should not be done in that behalf; and that it was only where there was a special and express purpose and intention to exclude the claim of legitim, that it was usual in *Scotland*, upon the marriage of a child, for the father to give such child a marriage

riage

riage portion in bar or satisfaction of legitim; and that where it was intended to exclude such claim, a clause accepting such marriage portion, and acknowledging it to be in lieu thereof, and expressly releasing the claim, was usually introduced into the marriage settlement of such child; but they stated that they did not know or believe that the late Lord *Breadalbane* ever expressed any intention, that the provision made by him for his daughter Lady *Chandos*, on her marriage, should be in satisfaction of her claim to legitim, and that they did not believe that he ever entertained such intention.

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The Defendants, by their answer, further stated, that the terms of the marriage settlement were arranged with the assistance, and under the advice, of the Earl of *Lauderdale*, who was educated for the *Scotch* bar, and was a member of the faculty of advocates, and was well acquainted with the law of *Scotland*, and particularly with the law of legitim, and was also well aware of the fact that the father and mother of Lady *Chandos* had married without any settlement; and they further stated that the portion or fortune of Lady *Chandos* was a subject which was left by the Defendants to their respective parents. The Defendants, by their answer, positively denied that they expected or intended, or that they believed that the other persons who were parties to the treaty of marriage, and approved of the Proposals, or any of them, expected or intended that there should be a clause in the settlement by which Lady *Chandos* would be made to release or renounce her right to legitim, or by which it would be declared that the provisions contained in the settlement were given to, and accepted by her in lieu of that right. They said they believed that the Proposals and settlement were made without any reference whatsoever, on the part of any of the persons who were parties thereto, or who took part in the treaty,

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treaty, to the right of Lady *Chandos* to legitim; and that they did not know or believe that it was the intention of the late Lord *Breadalbane*, and they positively denied that it was the intention of the Defendants, that the settlement should contain a clause barring or releasing that right. They further denied, that it was owing to mistake or misapprehension, or for any other reason, that the settlement was not prepared by Mr. *Vizard* in conformity with the Proposals; for, they said that, to the best of their knowledge and belief, such settlement was prepared, as to the matters in question in the cause, entirely in conformity with the Proposals, although it varied therefrom in several particulars as to other matters, not relevant to the questions in the cause.

They further stated, that the preparation of the settlement was left by the parties entirely to Mr. *Vizard*, who was the solicitor of the late Lord *Breadalbane*; and that they believed that the settlement did, in fact, contain all the clauses which were intended to be introduced therein. They denied that, according to the true construction of the settlement, the sum of 30,000*l.*, advanced by the late Lord *Breadalbane*, was in full satisfaction of any right which Lady *Chandos* had, or might thereafter have, to legitim, or that the Defendants, by being parties to and executing the settlement, had renounced or released such right. They stated, that in the action of multiplepinding in the Court of Session it was competent to the parties to such action to bring forward any defence, whether legal or equitable, to the claim to legitim set up by the Defendants, in right of Lady *Chandos*; and that it was competent to the Plaintiff to insist, in that action, that, if the marriage settlement did not expressly or effectually exclude such claim, the settlement ought to be corrected or reformed accordingly.

cordingly. They further stated, that since the filing of the bill, the appeal prosecuted by the Plaintiff against the judgment of the Court of Session, had been heard in the House of Lords, by which, on the 16th of *August* 1836, the judgment of the Court of Session had been in all respects affirmed (a); and they submitted that by such affirmance the right of Lady *Chandos* to legitimacy was conclusively established.

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The Defendants, the trustees, appeared and put in their answer to the bill; but it was admitted that they usually resided and were domiciled in Scotland.

Upon the coming in of the answer, the Vice Chancellor granted an injunction in the terms of the prayer of the bill. The Defendants, Lord and Lady *Chandos*, now moved that the injunction might be dissolved.

Mr. *Tinney*, Mr. *Pemberton*, Mr. *Burge*, Mr. *Wigram*, and Mr. *Stuart*, for the motion.


Mr. *Knight*, Mr. *Jacob*, and Mr. *Richards*, *contra*.

The case was very fully and elaborately argued; first, upon the preliminary question how far this Court had, under the circumstances, a right, or if it had the right, would, in the exercise of its discretion, be inclined, to adjudicate upon a matter which had already been entertained and disposed of by a foreign tribunal of competent jurisdiction; especially when that tribunal was legally, though not actually, in possession of the fund, and the trustees were properly amenable to its jurisdiction; and, secondly, upon the merits, as appearing from the admissions contained in the Defendants' answer.

Upon

(a) 2 *Shaw & Maclean*, 377.

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Upon the question of conflicting jurisdictions, and upon the effect of the discovery of new matter in inducing the Court to permit a former judgment or decree, either of its own or of another court, to be re-opened, the following authorities were cited; *Ogilvie v. Herne* (a), *Wharton v. May* (b), *Pieters v. Thompson* (c), *Beckford v. Kemble* (d), *Ball v. Storie* (e), *Kennedy v. The Earl of Cassillis* (g), *Bushby v. Munday* (h), *Lord Portarlington v. Soulby* (i), and the cases there referred to; *British Linen Company v. Drummond* (k), *De la Vega v. Vianna* (l), *Farquharson v. Seton* (m), *Lord Redesdale* (n), *Ord v. Noel* (o).

With respect to the principles which govern the Court, in rectifying instruments on the ground of mistake, *Marquess Townshend v. Stangroom* (p), *Peake v. Penlington* (q), *Beaumont v. Bramley* (r), and *The Duke of Bedford v. The Marquess of Abercorn* (s) were referred to.

To prove that, where the right of the child to legitim had not been excluded by the marriage settlement of the parents, it could only be barred by an express renunciation or release on the part of the child, reliance was placed on the judgment of the Court of Session in this very case, and on the affirmance of that judgment by the House of Lords. (t) Reference was also made, for

(a) 15 Ves. 563.

(b) 5 Ves. 71.

(c) Coop. 294.

(d) 1 Sim. & Stu. 7.

(e) 1 Sim. & Stu. 210.

(g) 2 Swan. 315.

(h) 5 Mad. 297.

(i) 3 Mylne & Keen, 104.

(k) 10 B. & Cress. 903.

(l) 1 B. & Ad. 284.

(m) 5 Russ. 45.

(n) 27. on Pl. 83—94. 4th ed.

(o) 6 Mad. 127.

(p) 6 Ves. 528.

(q) 2 Ves. & B. 311.

(r) 1 T. & Russ. 41.

(s) 1 Mylne & Craig, 312.

(t) 14 Shaw & Dun, 309., and
2 Shaw & Macd. 377.

for the purpose of more fully explaining the nature of the right, to *Lashley v. Hog* (a), *Clark v. Burns* (b), *Bell's Principles of the Law of Scotland*. (c)

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In support of the proposition, contended for by the Plaintiff, that according to the law and usage of *Scotland*, a clause barring legitim was a usual and necessary clause, in the marriage settlement of a daughter for whom her father thereby made a provision, and that Lord *Breadalbane* and Lord *Lauderdale* must, therefore, have understood the proviso, in the Proposals, for the introduction of all usual and necessary clauses in the settlement, as comprizing and referring to such a clause, several text writers upon the law of *Scotland*, and numerous books of precedents and forms of deeds, recognized by that law, were particularly referred to; among others, *Dallas's Styles* (d), *Spottiswoode on Writs* (e), *Bell's Forms of Deeds* (g), *Juridical Styles* (h), *Russell on Conveyancing*. (i)

The rest of the argument consisted chiefly of reasonings founded on the circumstances attending the treaty of marriage, and the situation and objects of the several parties to it, and of critical observations on the language and peculiar provisions of the different instruments. The points mainly insisted upon by the Plaintiff, in support of the injunction, are stated and considered in the judgment.

The

(a) Stated in *Robertson on Personal Succession*, p. 126.

(b) 13 *Shaw & Dun*. 326.

(c) page 432.

(d) pages 704. 731. 738.

(e) 5th edit. 420.

(g) Edit. 1804. pp. 510. 534—38.

(h) Vol. i. pp. 164, 165. 178. 183. 217, 218. 229. 293. 295., vol. iii. ed. 1795, pp. 168—172.

(i) 2d edit. p. 326.

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The *Solicitor-General* and Mr. T. J. Phillips, appeared for the Defendants, the trustees.

The LORD CHANCELLOR.

This was a motion to discharge an order of the Vice-Chancellor for an injunction restraining Lord and Lady Chandos from taking advantage of a judgment of the Court of Session in *Scotland*. The case was argued before me some considerable time ago. The magnitude of the sum in question between the parties, and the order which has been pronounced by the Vice-Chancellor, made me desirous to postpone my judgment, until I should have had time to go through the whole of the papers, and to consider the various points which had been argued at the bar. I have now had an opportunity of doing so; and I hope the parties have not experienced any material inconvenience from the delay which has taken place.

The bill raises three propositions. It first prays the Court to declare, that by the construction of the settlement of 1819, the claim to legitim is barred. It then alleges, that if that should not be found to be so, it was a matter of contract and agreement between the parties at the time of the marriage settlement of Lord and Lady Chandos, in the year 1819, that the legitim should be barred; and lastly, it alleges that a paper has lately been discovered, being the Proposals which preceded the settlement, and that those Proposals furnish evidence of the intention of the parties, or at least contain words amounting to a contract, that the settlement should contain a provision barring Lady Chandos's title to legitim; and on these three grounds — the
 construction

construction of the settlement of 1819, the alleged contract between the parties, and the effect of words found in the Proposals, though not introduced into the settlement, — it prays that the Court will grant an injunction to restrain Lord and Lady *Chandos* from taking advantage of the judgment of the Court of Session, by which Lady *Chandos* has been decreed entitled to her legitim.

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The sum in question is of great magnitude; for it is one third part of the whole personal estate of the late Lord *Breadalbane*, which personal estate is said to amount to 400,000*l*.

Now, as to the first of the propositions raised by the bill, that is finally disposed of by the judgment of the House of Lords. The construction of the settlement of 1819 has been the subject of a judgment of the Court of Session, and that judgment has been affirmed by the House of Lords, by which it has been decided that the settlement does not bar the title to legitim in this case.

The next proposition in the bill, namely, that it was a matter of contract, that the legitim should be barred, and that the settlement therefore did not carry into effect that which was agreed upon between the parties, is positively denied by the answer; and this being a motion upon the answer, it must, for the present purpose, be assumed, and indeed, looking at all the transactions between the parties, I have not the slightest doubt, that there was no such contract between them.

The only remaining point, therefore, is that which has been put forward, as the principal equity in support of the Plaintiff's claim to this injunction, namely, that the Proposals, which were not in evidence before the Court

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of Session, and which, it is alleged, have been since discovered, contain within themselves that which amounted to a contract, whether the parties had it in contemplation or not, that the legitim should be barred.

The Proposals were prepared in *London* by Mr. *Vizard*. It is stated that they were approved of by the Duke of *Buckingham*, acting for his son Lord *Chandos*, and by Lord *Breadalbane*, acting for his daughter Lady *Chandos*. The Proposals were, in substance, that Lord *Breadalbane* should pay 20,000*l.* — 10,000*l.* down, and 10,000*l.* within eighteen months after the marriage — and further, that he should enter into a security for the payment of 10,000*l.* more after his own death. In consideration of these three sums, making, in all, 30,000*l.*, the Duke of *Buckingham* agreed to settle very large estates on the issue of the marriage, and out of those estates to provide a jointure for Lady *Chandos*, and portions for younger children; and then, after enumerating the various trusts of the sums of money to be thus raised, the Proposals went on to provide for the different purposes which the parties had in view, with regard to the settlement of the real estates and the application of the 30,000*l.* for the benefit of the younger children. The Proposals then contained these words, — “the settlement to contain the usual clause of indemnity to trustees, and all other usual and necessary clauses.”

It is contended, that inasmuch as it is usual in *Scotland*, when a father provides a portion for a child, that he should require the child to enter into a renunciation of the claim to legitim, these words in the Proposals amounted to a contract between the parties, whether they had it in contemplation or not, that the settlement should contain that which is alleged to be a usual provision in *Scotch* settlements.

Now,

Now, the settlement itself was entirely of *English* manufacture: it was prepared by Mr. *Vizard*, who was an *English* solicitor; and, in point of fact, it contains no such clause; but it recites that Lord *Breadalbane* was to pay and secure 30,000*l.* as the portion or fortune of Lady *Chandos*. That has been adjudged not to amount to a renunciation of legitim; it being clearly established, that, in the *Scotch* law, legitim cannot be renounced by inference, but that express contract and distinct renunciation are required, for the purpose of depriving a child of legitim.

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Lord *Breadalbane* afterwards executed two bonds; one, to secure the 10,000*l.*, payable eighteen months after the marriage; and the other, to secure the 10,000*l.* payable after his own death.

It appears that in the year 1831, the other daughter of Lord *Breadalbane*, now Lady *Elizabeth Pringle*, married; and in her marriage settlement there is an express renunciation of her title to legitim.

It appears also that, in the year 1824, Lord *Chandos's* marriage having taken place in the year 1819, Lord *Breadalbane* was desirous, under a power given him by an act of parliament, of charging upon his estates the 10,000*l.* which he had contracted to pay within six months after his decease; and in the bond, which he then executed for that purpose, he expressly declared, that the 10,000*l.* so charged, was to be in bar of Lady *Chandos's* title to legitim. That circumstance, however, can only be material in so far as it may evidence the impression upon Lord *Breadalbane's* mind: it cannot affect the rights of the parties, which are to be determined, not by any thing which Lord *Breadalbane* did

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after the marriage, but by that which took place between the parties at the time of the marriage.

It appears, moreover, that anterior to the marriage, that is to say, in the years 1794, 1798, and 1812, Lord *Breadalbane* executed certain instruments, making provision for his younger children; and that in all those instruments it is declared, that the provision so secured was to be in bar of the children's title to legitim. These instruments, of course, are immaterial to the present purpose; they are important only as shewing Lord *Breadalbane's* knowledge of what was necessary in order to bar a child's claim to legitim.

The Court of Session in *Scotland* is, unquestionably, a court of equity as well as a court of law; and I apprehend there can be no doubt, that it was within the jurisdiction of the Court of Session to entertain the question which the Plaintiff has thought proper to raise upon this record. The suit in *Scotland* was a suit of multipounding, in which all parties, having any claim, were called before the Court, for the purpose of asserting their title to the personal property of Lord *Breadalbane*. The question, whether Lady *Chandos's* title to legitim was barred by the settlement, was distinctly raised in that suit; but no question, with respect to that title, founded on the supposed effect of the terms of the Proposals, was then brought forward. It certainly is contrary to the practice of this Court to assume jurisdiction in favour of parties who, having had an opportunity of asserting their title in another court, where the matter has been properly the subject of adjudication, have either missed that opportunity, or have not thought proper to bring their title forward.

In

In the view I have taken of this case, however, it is not necessary to pursue that topic further. I have adverted to it only that I may not be misunderstood; that it may not be thought to be clear that this Court would entertain or enforce a claim to an equity, after the case had been the subject of adjudication by another Court, of competent jurisdiction, and in which the matter of equity was equally cognizable, upon the ground of the party not having thought proper, or having from accident, or for any other reason, taken no steps, to bring the claim before that Court.

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Such being the case made by the bill, the Defendants, by their answer, positively deny all contract or understanding on the subject. They say that the whole negotiation was left to the Duke of *Buckingham*, on the one side, and to Lord *Breadalbane*, on the other: they admit that it is usual in *Scotland* to insert clauses barring legitim; but they state, that which was established to be the law of *Scotland* by the decision of the House of Lords in this very case, that although it is usual to insert a clause barring legitim, yet legitim cannot be barred except by distinct contract. They also admit that, on Lady *Elizabeth Pringle's* marriage, her legitim was barred; but they allege that it was barred by express contract, introduced into her marriage settlement.

Now, by what is stated in the answer, and by what was decided in the Court of Session, and confirmed by the House of Lords, two points are clearly established; first, that the mere giving a portion is no bar to legitim, but that in order to bar legitim it is necessary there should be express renunciation; and secondly, that the settlement in this case did not operate as a bar to the right claimed by Lady *Chandos*.

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The sole consideration, therefore, is whether the provision, in the Proposals, for the insertion of "the usual and necessary clauses" entitles the Plaintiff to have the settlement reformed by the insertion of such a clause.

The first question is, was that the intention of the parties? First of all, was it the intention of Lord and Lady *Chandos*, the parties from whom this very valuable right is supposed to have been taken away by what took place in the year 1819? By their answer they positively deny, not only that there was any such intention, or any such contract, on their parts, but that the subject-matter was present to their minds at all. In short, they state that they knew nothing about legitim; and there is no reason to suppose that the case is at all misrepresented by the answer.

The next question is, was it the intention of the Duke of *Buckingham* to surrender the claim to legitim? It is equally clear that he thought nothing about it: it is probable that he knew nothing about it; and there is an absence of all evidence that he ever had present to his mind the claim of legitim, to which his son, in right of his wife, would become entitled, or that he ever intended to consent to the barring of any such claim.

It is then said, though that may be true, yet Lord *Breadalbane*, living in *Scotland*, and being acquainted more or less with *Scotch* law, and having the assistance of a very experienced *Scotch* lawyer, Lord *Lauderdale*, whom he appears to have consulted on all the arrangements with regard to the settlement, must have known the law of *Scotland* with reference to the child's title to legitim, and have known that it was usual to insert clauses barring legitim, in settlements made by a father
 on

on his children; and that he must therefore have understood the words "usual and necessary clauses" as intending to provide that the settlement to be prepared in pursuance of the Proposals should contain a clause barring Lady *Chandos's* title to legitim.

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The first observation that arises upon that proposition is this, that Lord *Breadalbane* was afterwards a party to the settlement itself, which contains no such clause. It also appears that subsequently, namely, in the year 1824, he executed a deed of that date, by which he charged the sum of 10,000*l.*, payable within six months after his decease, upon his *Scotch* estates, and declared that it should be in bar of legitim. Now, if he had supposed that legitim had been already barred by the settlement, it would have been perfectly unnecessary, in a deed which was meant to carry into effect the provisions of the settlement, to specify that the sum thus secured should be in bar of legitim.

But, supposing that Lord *Breadalbane* had any such intention,—supposing that, as he resided in *Scotland*, he was more or less cognizant of *Scotch* law, and that the right of the child to legitim, and the means by which that right might be barred, had been present to his mind—it is quite clear that he never even communicated his intention to the other parties. The renunciation of legitim by his daughter was a proceeding which would enure to his own benefit: he was authorised to treat, on her behalf, with the father of her intended husband, with respect to such rights as he conferred upon her by the provision of 30,000*l.* which he then made in her favour; but he had no authority, nor was it ever supposed that he was invested with any authority, to treat, not as with the father of the husband, but as between himself and his daughter on the subject of her claim to

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legitim; the daughter and her intended husband being entirely ignorant of the existence of any such claim, or of any such effect being given, or intended to be given, to the transaction then in progress.

Now, if Lord *Breadalbane* put that construction upon those words — of which, however, there is not only no evidence, but as to which I am perfectly satisfied that the subject-matter, strange as it may appear, was as absent from his mind and from the mind of Lord *Lauderdale*, who was acting for him, as it was from the minds of Lord and Lady *Chandos*, or of the solicitor who was acting for them, or of the Duke of *Buckingham*, who was acting for Lord *Chandos* — but if that was the impression upon his own mind, and it was not communicated to the other parties, or present to their minds, it would be extremely difficult, from that impression, to contend that the title of Lady *Chandos* to legitim out of his personal estate was to be barred.

If Lord *Breadalbane* did so understand the words in the Proposals, it must have been because he was acquainted with the *Scotch* law, and knew that such provisions were usually inserted in *Scotch* settlements: and yet it is most extraordinary, that, with that knowledge, and with the supposed construction put by himself upon the words, he should have afterwards executed a settlement which contained no such provision; although the proposition assumes that he, being conversant with *Scotch* law, knew that by that law an express renunciation of legitim was necessary, in order to carry his intention into effect. It is positively denied that the parties, sought to be affected by this injunction, knew any thing about the claim to legitim; and the result of the whole leaves no doubt upon my mind that the matter was not present to the minds of any of the parties.

Still,

Still, however, though the parties had not the subject-matter present to these minds, they may have used words which would operate upon rights of which they were not cognizant. If a person thinks proper to bar all the rights which he has, it is not necessary to prove that he knew all his rights, or that he had ascertained what his rights were.

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That brings the case to the question — the only arguable question, — what is the effect of these words in the Proposals. Now it must always be kept in view that, by the law of *Scotland*, nothing but an express renunciation will have the effect of barring the title to legitime; and it would be a strange conclusion, indeed, if the Court were to decide, that the introduction of these words into the Proposals had the effect of depriving one of the contracting parties of a title to property of so enormous an amount, although none of the parties to the arrangement intended that the words should have any such operation.

Nevertheless, it is possible that the words may have had that effect. Now the Proposals relate entirely to *English* subject-matter. They are made between parties resident in *England*: they were made with reference to the marriage settlement of the son of an *English* nobleman marrying the daughter of a *Scotch* nobleman: they were prepared in *England*: the subject-matter was *English*, and all the parties were *English*; and, after providing for all the purposes usual in a settlement of that description, — pin-money and a jointure for the wife, portions for the younger children, and then for the settlement of the estate, — the Proposals conclude in these words, — “the settlement to contain the usual clause of indemnity to trustees, and all other usual and necessary clauses.” Now, I apprehend, taking these Proposals

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posals according to their ordinary sense, that, when parties, after stating what they profess to do, and the provisions which they intend to make, provide that "all usual and necessary clauses" shall be inserted, they must be understood to mean all clauses usual and necessary for the purpose of carrying into effect the provisions before expressed; and of these the right to legitim formed no part.

In *Anstruther v. Adair* (a), the case arose out of a settlement which was executed in *Scotland*, between parties domiciled in that country, and the question was with respect to the equity of the wife according to the *English* law. It was decided, and most properly decided, by Lord *Brougham*, that the settlement being executed in *Scotland* between *Scotch* parties, it must be dealt with according to the law of *Scotland*; and that you cannot apply the equities of the *English* law between parties living in *Scotland*, and who never had those equities in their contemplation. So, here, in the case of a settlement to be executed in *England*, between *English* parties, relating to *English* subject-matter, and providing for its objects by the usual clauses, and not with reference to any thing dehors the settlement, or to any right which might arise by the law of a foreign country, — *Scotland* being for this purpose a foreign country, and under the administration of different laws, — the obvious meaning of these words in the proviso would be, that there should be all such clauses as were usual and necessary for the purpose of carrying into effect the contract between the parties.

There were cited, not, I believe, in the argument here, but in the course of the argument in the House of Lords,

(a) 2 *Mylne & Keen*, 513.

Lords, a variety of cases with respect to that part of our law which bears the nearest analogy to the law of legitim in *Scotland*; I mean the law with respect to the right of children, under the customs of *London* and *York*, to a share of their deceased parents' estate; and several instances were referred to, in which the title of the child had been barred by the provision given by the father to the child. Cases were cited in which the father had advanced a portion to his child, and had stipulated that such advancement should bar the orphanage part; but no case was produced, and I presume no case exists, in which the title of the child has been held to be barred by that which has taken place here, namely, by simply advancing the portion of the child, in terms such as those which are contained in this settlement; the only words, in the settlement, on which the argument was founded, being, that the 30,000*l.* were there expressed to be given "as the portion or fortune" of Lady *Chandos*.

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The ground upon which this motion is rested, is, that there is evidence which would justify the Court in correcting the settlement. The Proposals having been afterwards matured into a settlement, it is the settlement which binds the rights of the parties, unless there be something bringing the case within the authority of other cases, in which the Court has felt itself authorised to correct a settlement, upon the ground of mistake or misapprehension, and to introduce into the instrument something which appears to have been the intention of the parties, as evidenced by other means than the settlement itself.

Now, in order to justify the Court in taking such a course, it is obvious that a clear intention must be proved; it must be shewn that the settlement does not
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carry into effect the intention of the parties. If there be merely evidence of doubtful or ambiguous words having been used, the settlement itself is the construction which the parties have put upon those doubtful or ambiguous words. They have themselves removed any doubt, which might have existed, upon that which forms the foundation of the settlement. But, in this case, although it is unnecessary for me to pursue that subject farther, there is, in fact, an absence of proof that the settlement did grow out of these Proposals. It differs from the Proposals in some most important parts. No doubt those were the Proposals originally suggested: what passed between the time when the Proposals were prepared, and the execution of the settlement — what gave rise to any change of intention, or why it was that the settlement was not in conformity with the Proposals in other matters, — does not at all appear; but there is evidence of a manifest departure, in the settlement, in some important points, from the arrangement as contained in the Proposals. In order to justify the Court in correcting the settlement, it must be proved, not only that the contract was different from that which the settlement carried into effect, but that there was no change of intention, by which the circumstance that the settlement did not follow the terms of the original contract might be explained.

If Lord *Breadalbane* had the knowledge which is the foundation of the whole argument—if, seeing these words in the Proposals, he imagined that the settlement would contain terms barring Lady *Chandos's* title to legitim out of his estate, he would of course have expected that the settlement should be so framed as to effect that purpose; and, as the benefit of her renunciation would enure to him, he would naturally look to see that his object had been accomplished. Lord
Breadalbane,

Breadalbane, however, is made a party to that settlement, not for the purpose of taking the benefit of Lady *Chandos's* renunciation, but because he was a party contracting to make further provision for Lady *Chandos* by paying 20,000*l.* at a future period to the trustees; and there is nothing in the settlement, which could induce him to suppose, that the intention which he is assumed to have had in his mind, of protecting his personal estate from the claim of Lady *Chandos* to legitim, had been carried into effect.

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In the course of the argument here, many books were referred to, for the purpose of shewing, that, in *Scotch* settlements, it is usual to insert clauses barring legitim. That only proves, however, that it is usual so to contract; for it is decided that, without special contract for that purpose, legitim cannot be barred; and the question is, not whether it is usual in *Scotch* settlements, but whether it is usual in *English* settlements, in which no reference is made to legitim, or to any rights dependent upon the *Scotch* law, to insert such a clause.

It is sworn by the answer, by which I am, on this motion, bound, that Lord and Lady *Chandos* never intended to give up their claim to legitim; and I am satisfied, from all the facts of the case, as they are now before the Court, that the question never once occurred to the minds of any of the parties. If it had, that claim might have been barred: but, looking to the settlement, I am equally clear that it provided "all the usual and necessary clauses" which the parties intended; and I must construe the Proposals to mean, all clauses usual and necessary for the purpose of carrying into effect the arrangement before detailed, of which the renunciation of legitim formed no part.

I am

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I am also of opinion, that if this were doubtful, the settlement afterwards executed removes the doubt, and proves what the parties meant; and that there is not any such evidence to shew a mistake in the settlement, as would justify a court of equity in interfering to reform the settlement upon that ground.

Upon these grounds, I am bound to dissolve the injunction which the Vice-Chancellor has granted.

ERRATUM.

In page 670. line 6. for "where the Crown has not named" read "before the Crown has named".

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BILLS OF EXCHANGE.

A merchant abroad sent drafts from time to time to his *London* correspondent for acceptance, under an authority for that purpose, and

upon an understanding that the liabilities of the latter in respect of all such acceptances, should be covered by means of bills payable in *London* to be remitted to him from time to time. Under such an arrangement, the presumption is, until an agreement to the contrary is shewn, that the *London* correspondent was not intended or entitled to treat the bills, so remitted, as cash, or to discount them before maturity; and, therefore, it was held that two of such bills, which were existing in specie in his hands at the time of his bankruptcy, and were not then due, did not pass to his assignees, but were the property of the party who had remitted them. *Jombart v. Woollett*. Page 389

BOND.

Bond for a sum of money, ordered to be delivered up to be cancelled; the Lord Chancellor being of opinion, upon the evidence, first, that the bond was not intended to operate as a security for money at all events, but was given for a collateral purpose, which had been fully satisfied; and, secondly, if that were doubtful, that the obligee's subsequent conduct and mode of dealing with the bond during the whole of his life amounted, in equity, to a release of the debt. *Flower v. Marten*. 459

See CONSTRUCTION, 2, 3.

BREACH

BREACH OF TRUST.

Where property is devoted to trusts which are to arise at a future time, and be exercised by trustees who are not yet in *esse*, any intermediate act done by the holders of such property inconsistent with the security of the property, or the performance of the trusts when they shall arise, will be set aside; and if the trusts are of a public nature, the Court will entertain this jurisdiction upon an information by the Attorney-General, notwithstanding that the trustees, after they have come into *esse*, themselves decline to interfere. *Attorney-General v. Aspinall*. Page 613

See DEMURRER, 2.

MUNICIPAL CORPORATIONS.

CHARGE.

See WILL, 2, 3.

CHARITY.

1. A decree having directed the settlement of a scheme for the regulation of the hospital of King James in Colchester, and for the future application of its revenues, the Court, in afterwards considering the scheme, came to the conclusion that, upon the true construction of the charter of foundation, and of the laws and statutes of the hospital, it was in-

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tended, and was essential to the proper performance of his official duties, that the master should have a proper residence within the hospital, or on the lands belonging thereto; and a reference was accordingly directed for the purpose of ascertaining the best mode of providing such residence; but the Court declined to make any specific declaration that it was the duty of the master to reside, that being a matter falling within the jurisdiction of the visitor. *Attorney-General v. Smythies*.

Page 135

2. When a reference has been made to the Master to appoint trustees of a charity, it is the rule of the Court to adopt the Master's appointments, unless the persons appointed can be shewn to be objectionable; and the Court will not enter into the question of the fitness of other persons whom the Master has refused to appoint.

Where, however, under the Municipal Corporation Regulation Act, a reference had been made to the Master, to appoint new trustees of charity property, in the stead of the old corporation, who had been the former trustees, and the Master had received evidence which tended to shew that there was a suspicion of the old trustees having exercised their trust for political purposes, and had declined to re-appoint any of the old trustees, and had written a memorandum, stating that he had come to that

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determination "in consequence of the case made against the old trustees;" the Court entered into the consideration of the propriety of the Master's conduct in rejecting all the old trustees; and held, that the existence of a general suspicion of impropriety on the part of the old trustees in the exercise of their trust, whether that suspicion were well or ill founded, justified the Master in declining to re-appoint any of the old trustees.

An institution for the maintenance and education of poor children, founded in 1617, and chartered in 4 Car. 1. (1628), was held, under the circumstances, to be not exclusively a Church of England charity, so as to make it proper to place it under the superintendence of a body of trustees consisting entirely of members of the Church of England. *In the Matter of the Norwich Charities.* Page 275

COLLEGE.

Upon the true construction of the Charter and Statutes of *Downing College, Cambridge*, a person who is in holy orders is not ineligible to the office of Master of the college, provided he has the other qualifications thereby prescribed.

The Charter declared that the number of fellows should be sixteen, two of whom should be in holy orders, and the rest should be laymen; it then nominated

three persons as fellows, all of whom were laymen; and it provided that the remaining thirteen should not be nominated until after the completion of the College buildings: *Semble*, It is not absolutely necessary that a vacancy in one of these three original fellowships, prior to the completion of the College buildings, should be supplied by the election of a lay fellow.

Effect of long and undisturbed possession in influencing the decision of a visitor, in a case where the right may be doubtful. *In the Matter of Downing College.*

Page 642

COMMISSION.

See LUNATIC, 1.

COMMITTEE OF PERSON.

See LUNATIC, 2.

CONDITION.

See CONSTRUCTION, 2.

VENDOR AND PURCHASER.

CONSTRUCTION.

1. Marriage articles recited that *L.*, the father of the intended husband, had agreed, in case the marriage should take effect, to pay 200*l.*, and also to settle the lands of *T.* in the manner, to the uses, and upon the trusts therein-after mentioned; and that *S.*, the father of the intended wife, who was an infant, had agreed to convey the lands of *G.* in the manner,

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at the time, to the uses, and upon the trusts thereafter mentioned, and also to pay to the intended husband 100*l.* upon the marriage; it was then covenanted by *L.* that, in case the marriage should take effect, and *S.* should, as soon as the intended wife came of age, settle the lands of *G.* to the uses thereafter expressed, he, *L.*, would settle the lands of *T.* to his own use until the marriage, and from and after the marriage, to his own use, for life, with remainder upon certain trusts for the benefit of the husband and wife, and the issue of the marriage; and it was covenanted by *S.*, that in case the marriage should take effect, and *L.* should perform his covenant, he, *S.*, would settle the lands of *G.* to the use of himself for life, with remainder upon certain trusts for the benefit of the husband and wife, and issue of the marriage. The marriage took effect, and the wife came of age; but *S.* failed to settle the lands of *G.*: Held, nevertheless, that *L.* was bound to perform the covenant on his part. *Lloyd v. Lloyd.* Page 192

2. *E.* and *F.* entered into a joint and several bond, of which the condition was, that if they or either of them, their or either of their heirs, &c. duly paid an annuity to *B.* for his life in manner following; viz. one moiety thereof by *E.*, during her life, and the other moiety thereof by *F.*, his executors or administrators, during the life of *E.*, and after the death

of *E.*, the whole by *F.* his heirs, executors, or administrators, during the life of *B.*, then the bond should be void: Held, that the liability under this bond was joint and several, and that *F.* having failed after the death of *E.* in paying the annuity, the estate of *E.* was liable on his default. *Church v. King.* Page 220

3. A son, being indebted to his father upon a bond for 1000*l.* and interest, subsequently joined his father, as surety, in a bond for 500*l.* and interest given by the father to a third person; and a memorandum was then indorsed upon the bond for 1000*l.*, by which it was agreed between the father and son that the son should not be called on to pay the within mentioned principal sum of 1000*l.* until the father should have paid all principal money and interest, due on the bond for 500*l.*: Held, that this indorsement did not affect the interest accruing due upon the bond for 1000*l.*, and therefore that, after the deaths of the father and son, the personal representative of the father might file a bill against the real and personal representatives of the son, praying for immediate payment of the interest on the bond for 1000*l.*, and for payment of the principal, when the principal and interest on the bond for 500*l.* should have been paid.

A surety who compounds a debt for which his principal and himself have become jointly liable,

and takes an assignment of that debt to a trustee for himself, can only claim, against his principal, the amount which he has actually paid. *Reed v. Norris*. Page 361

4. Lands were limited by deed to the use of the settlor for life; remainder to the use of his wife for life; remainder to the use of the heir female of the body of the settlor, on the body of his wife already begotten, and now living or which may be begotten hereafter; and in default of such issue, to the use of the heir male of the body of the settlor on the body of his wife to be begotten; remainder to the right heirs of the settlor. At the time when this deed was executed, the settlor and his wife had issue four daughters, and no issue male; but at his death the same four daughters and also several sons of the marriage survived him: Held, that under the limitation to the heir female, the daughters took a life estate in the lands as purchasers. *Chambers v. Taylor*. 376

See COLLEGE.

SETTLEMENT.

VENDOR AND PURCHASER.

WILL, 1, 2, 3.

CONSTRUCTION OF STATUTES.

By the act 53 G. 3. c. 159., the liability of a shipowner for damage done by his ship, without his fault or privity, to another ship, is limited to the value of the ship

doing the damage, and her appurtenances and freight:

Held, that the value of the ship doing the damage, is the price at which she could be sold; and that price must be ascertained, not by making deductions from her cost price, proportioned to her age, but by a valuation and appraisement.

Dobree v. Schroder. Page 489

See PRACTICE, 5.

STATUTES.

CONTEMPT.

A Barrister, who was also a Member of Parliament, appeared before a Master as counsel in support of a petition presented by himself and others; and he afterwards addressed a letter to the Master, which was expressed in threatening terms, and the tendency of which was to induce the Master to alter the opinion he was supposed to have formed upon the case; and he subsequently wrote a letter to the Lord Chancellor, in which he avowed the authorship of the letter to the Master. The Lord Chancellor committed him to the *Fleet*, during pleasure. *Mr. Lechmere Charlton's Case*. 316

See PRACTICE, 1. 6.

COPYHOLD.

See NEW TRIAL.

CORPORATION.

See MUNICIPAL CORPORATIONS.

COSTS.

COSTS.

1. When a Defendant puts a demurrer on record, and also demurs *ore tenus*, if the demurrer on record is overruled, but the demurrer *ore tenus* is allowed, the Defendant must pay the costs of the demurrer on record, unless the Court, at the time, makes other order to the contrary; and, *semble*, the Court will not be disposed to make such other order. *Mortimer v. Fraser.* Page 173
2. If a client, having paid his solicitor's bill of costs, without pressure or undue influence, wishes afterwards to have it taxed, he must state in his petition, and prove by evidence, that the bill contains such grossly improper charges, as furnish evidence of fraud; and the petition must point out the particular items to which that description applies, and those items must be proved by evidence to answer the description.

An allegation that a solicitor has received monies on account of his client, for which credit has not been given in the settlement of a bill of costs, is not sufficient, although supported by evidence, to warrant an order for the taxation of the bill.

Principles of the Court with respect to the taxation of a solicitor's bill after payment. *Horlock v. Smith.* 495

3. Refusal to order the taxation of a solicitor's bills of costs, the

amount of which had been secured by a deed in the year 1819, although the suit was then pending; the client's affairs having, since the year 1822 (when that solicitor died), been in the hands of another solicitor, and there being no proof of such dealings between the solicitor and client, or of such errors or improper charges in the bill, as could amount to evidence of fraud.

Waters v. Taylor. Page 526

4. Of two Defendants to a bill, one only demurred; and the demurrer having been allowed by the Vice-Chancellor, the Plaintiff appealed. The order for setting down the appeal was served on the other Defendant's solicitor, who afterwards received a letter from the Plaintiff's solicitor, asking him whether he would consent to have the appeal advanced; and that Defendant appeared upon the argument, but was not allowed to be heard: Held, that he was not entitled to the costs of his appearance. *Crawshay v. Thornton.* 23

See INFANTS.

COVENANTS, MUTUAL.

See CONSTRUCTION, 1.

CUSTOM.

According to the custom of descent in the manor of *Taunton Deane*, a surviving sister is not entitled to inherit in preference to the son of

a deceased brother's son. *Locke v. Colman.* Page 635

See NEW TRIAL.

DEMURRER.

1. Where two inconsistent statements are made in a bill, a Defendant is entitled, upon demurrer, to adopt that which is most against the Plaintiff's interest.

It appeared by the statements made in a bill, that in *September* 1794, a father, tenant for life, and his eldest son, tenant in tail, of a plantation and slaves, subject to a lease, suffered a recovery, and limited the property to the father for life, with remainder to the son for life, with remainder to the son's first and other sons in tail. The bill then stated, that in the year 1794, not specifying at what part of the year, the lessee removed some of the slaves to a plantation which belonged to himself, and then sold that plantation with the slaves upon it; and that afterwards, while the father was still living, the lessee, having represented to the son that there was some difficulty in distinguishing the slaves which belonged to the settled estate from those which were the property of the lessee, prevailed upon the son to give him a deed of indemnity against his (the son's) claims, in respect of the slaves so removed and sold; and the bill stated that the son

was at the time wholly ignorant of the nature and extent of the sale, and of the circumstances stated by the lessee:

Held, that upon these statements, a Defendant was entitled, for the purposes of a demurrer, to infer that the removal of the slaves took place before the month of *September* 1794, and while the son was still tenant in tail; and that the son was cognizant of their removal at the time.

Where a bill had set forth the limitations of a settlement in such manner as to shew that the Plaintiff's father, who was still living, was tenant for life, with remainder to the Plaintiff as tenant in tail; but subsequent parts of the bill had spoken of the father as tenant in tail, and of the Plaintiff as heir in tail: Held, that the Defendant was entitled, on demurrer, to consider that the Plaintiff had merely stated himself to be issue in tail, in which character he would have no right to institute the suit.

A demurrer for want of parties and for want of equity was allowed, and the Plaintiff appealed, but admitted, at the bar, that the bill was defective for want of parties. The Lord Chancellor expressed strong disapprobation of the appeal, as the only question could be whether the old bill should be amended or a new bill be filed.

Amendment permitted in a case in which the Court had reason to believe that allegations, upon the ground of which a demurrer had been

been allowed, had crept into the bill by accident. *Vernon v. Vernon*. Page 145

2. A Plaintiff seeking to charge a party with the consequences of a breach of trust, is bound so to state his case upon the bill that the circumstances alleged, if proved, must necessarily and at all events constitute a breach of trust.

Where, therefore, an information was filed, alleging that certain payments, charged to be illegal and improper, were about to be made, by a municipal corporation, out of the corporate funds, and praying that the corporation might be restrained from making them, but the payments were of such a kind that, under certain circumstances, the existence of which was not negatived by any statements in the information, they might be justifiable, a demurrer for want of equity was allowed.

Where persons entrusted with the administration of a fund have incurred legitimate and proper expenses in performing duties thrown upon them by their fiduciary situation, they have a right, both at law and in equity, to reimburse themselves out of the funds in their hands, without any special provision to that effect.

Semle; A municipal corporation is justified in discharging, out of the corporate funds, the expenses of opposing *quo warranto* informations against indi-

vidual members of the corporation, if the object of such informations be to impeach the title or destroy the legal existence of the corporation as a body. *Attorney-General v. The Mayor of Norwich*. Page 407

See APPEAL.

COSTS, 1. 4.

PARTIES.

PRACTICE, 1.

DESCENT.

See CUSTOM.

DEVISE.

See REVOCATION.

DISTRIBUTION.

See REFUNDING.

ECCLESIASTICAL COURT.

See RECEIVER.

EJECTMENT.

See INJUNCTION, 2.

FELLOWSHIP.

See COLLEGE.

FEME COVERT.

See POWER.

HEIR FEMALE.

See CONSTRUCTION, 4.

3 D 4 INFANTS.

INFANTS.

Of several suits instituted on behalf of infants, and for the protection of their property, the Court will give a preference to that which is capable, from its frame, of being most beneficially and effectually prosecuted, notwithstanding that in point of form the relief sought by another is more extensive.

Trustees for infants, or their next friends, persisting in unnecessary litigation, ordered to pay the costs personally. *Campbell v. Campbell*. Page 25

See WARD OF COURT.

INJUNCTION.

1. Injunction granted, on information and bill, upon the ground of public nuisance, to restrain the magistrates of a county from cutting the timbers supporting the roadway of a bridge, which timbers and roadway, at the place proposed to be cut, were within their jurisdiction, but of which the other extremity was within the jurisdiction of a different county.

Principles on which courts of equity interfere by injunction, in cases of apprehended nuisance to the public. *Attorney-General v. Forbes*. 123

2. A bill, praying for an injunction to stay an ejectment, stated that the Plaintiffs in equity had no defence at law: the bill was supported by an affidavit, which con-

tained the same statement, and an *ex parte* injunction was granted upon the bill and affidavit. An order was afterwards made, dissolving the injunction; and a further order was subsequently made, by which the Plaintiffs in equity were directed to give judgment in the ejectment: Held, upon appeal, that the principles and practice of the Court did not warrant the last-mentioned order. *Brown v. Newall*. Page 558

See INTERPLEADER, 2.

LUNATIC, 4.

INTERPLEADER.

1. *A.* deposited certain iron with *B.* and Co., who were wharfingers, and afterwards directed them to deliver it to *C.* *C.* applied to *B.* and Co., to know the particulars of the iron held by them on his account; and *B.* and Co. then wrote a letter to *C.*, saying, that in compliance with his request they annexed a note of the landing weights of the iron transferred into his name by *A.*, and now held by them (*B.* and Co.) at his (*C.*'s) disposal. *B.* and Co. subsequently received notice from *D.* that the iron belonged to him, and that it had been deposited with *A.* as an agent for sale, and that he had without authority pledged it to *C.* *B.* and Co. then filed a bill of interpleader against *C.* and *D.*: Held, on demurrer, (affirming the decision of the Court below) that after *B.* and Co.'s letter to *C.*, they

they could not maintain a bill of interpleader against him. *Crawshay v. Thornton*. Page 1

2. By the common order for an injunction, in an interpleading suit, the injunction is directed to issue upon bringing the fund in question into Court; and if, without the special direction of the Court, the order is so drawn up that it does not make the bringing the fund into Court a condition precedent to the issuing of the injunction, the order will be discharged for irregularity.

Semble, if there is not time to bring the fund into Court, a special order will be made to provide for the emergency.

A party against whom such a double demand is made as to entitle him to file a bill of interpleader, is not bound to file it, so long as the course of proceeding taken by the different claimants is such as, if persevered in, will determine their respective rights, as between themselves, without the intervention of this Court by interpleader.

Where the Court sees that the continuance of the injunction in an interpleading suit, in full force, may have the effect of enabling a stranger to deprive the parties to the suit of the legal rights which they have already acquired, the injunction will be suspended so far as to allow proceedings at law to go on to judgment. *Sieeking v. Behrens*. 581

INTESTATE'S ESTATE.

See REFUNDING.

ISSUE.

See NEW TRIAL.

JURISDICTION.

See CHARITY, 1.

LUNATIC, 5.

MUNICIPAL CORPORATIONS.

PARTIES.

PRACTICE, 4.

WARD OF COURT.

JUST ALLOWANCES.

See ACCOUNT.

LEGACY.

See LIMITATION ACT.

LEGACY DUTY.

The personal assets, situate in *India*, of a testator who resides, and makes his will, and dies, in *India*, are not subject to legacy duty, although such assets are afterwards remitted to this country, by an executor who has proved the will in *India*, to executors who have proved the will in *England*, and are administered under a decree of the Court of Chancery here.

A man possessed of personal estate, situate partly in *England*, but

but principally in the *East Indies*, where he was employed in the service of the *East India Company*, made his will in the *East Indies*, and died there. After specifically bequeathing his property in *England* to his wife, his will gave considerable pecuniary legacies to his infant children and to various other persons, some of whom were native inhabitants of *India*. One of the executors lived in *Calcutta*, and proved the will there, and having collected the *Indian* assets, and thereout paid the testator's *Indian* debts and funeral expenses, he remitted the surplus to *England* to the other executors, by whom probate of the will, in respect of the property in *England*, had been already obtained in this country. In a suit instituted in this Court by the testator's children against the executors, for the administration of the estate, the fund so remitted was transferred into Court, and having proved insufficient to pay the pecuniary legacies in full, it was ultimately ordered to be apportioned among the different legatees, in proportion to their respective legacies: Held, that the legacy duty was not payable in respect of any of the sums so appropriated to the respective legatees. *Arnold v. Arnold*.

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LEGITIM.

See SETTLEMENT.

LIMITATION ACT.

A suit to make an executor account for a sum of money which had been bequeathed to him by his testator upon certain trusts, and which had been severed by the executor from the testator's personal estates, and the interest of which had for a time been applied upon the trusts of the will, is not a suit to recover a legacy, within the meaning of the *Limitation Act*, 3 & 4 *W. 4. c. 27*. *Phillipo v. Munnings*. Page 309

LUNATIC.

1. To avoid inconvenience and expense, a commission was directed to issue into *Middlesex*, although the supposed lunatic was residing in *Herts*. *In re Waters*. 38
2. Where an individual is found lunatic under an inquisition taken in *England*, the appointment of committees of his person rests with the Lord Chancellor of *Great Britain*, notwithstanding that the property of the lunatic is situated in *Ireland*, and that a transcript of the record of the inquisition has been transmitted to the Chancery of that country, with a view to the appointment of committees of his estate by the Lord Chancellor of *Ireland*. *In re Tottenham*. 39
3. Principles by which the Lord Chancellor, when protector of a settlement in the place of a lunatic, will be guided, in giving or withholding his consent to a deed of disposition under the *Fines and Reco-*

Recoveries Act. *In the Matter of Newman.* Page 112

4. Order made to restrain an action brought by an auctioneer, against the solicitor in a lunacy, for the amount of his bill for appraising and selling property belonging to the lunatic, such sale having been made under the authority of the Court, and the auctioneer having acted on the instructions of the solicitor, and with the sanction of the Master before whom he had at first carried in his claim; and a reference directed for the purpose of ascertaining what would be a proper sum to be allowed him on that account. *In the Matter of Weaver.* 441

5. Upon an application, under the 1 W. 4. c. 60., for the transfer of stock standing in the name of a lunatic trustee, the Lord Chancellor will not adopt the facts as found in the proceedings in a suit in the Court of Exchequer, but will require them to be ascertained by the usual reference. *In the Matter of Prideaux.* 640

MARSHALLING.

See WILL, 3.

MANOR.

See CUSTOM.

MEMBER OF PARLIAMENT.

See CONTEMPT.

MISTAKE.

See BOND.

CONSTRUCTION, 2.
SETTLEMENT.

MORTGAGE.

See PRACTICE, 3.

MOTION.

See PRACTICE, 7.

MUNICIPAL CORPORATIONS.

The funds belonging to the municipal corporations of boroughs named in schedules A. and B., of the 6 W. 4. c. 76. (the Municipal Corporation Act) became, upon the passing of that Act, subject to certain public trusts, to be exercised by the new Council only in the manner and for the purposes prescribed by the Act.

An appropriation of such funds, made by the old corporation, after the passing of the act, but before the election of the new council, and having for its object to endow the churches and chapels of the established church within the borough with fixed stipends, for their several ministers, is not an appropriation warranted by the Act, and is therefore a breach of trust.

The ordinary jurisdiction of the Court over such a transaction, by means of an information seeking to have the funds recalled, and the

the appropriation rescinded, as being a breach of trust, is not ousted by the special remedies provided in certain cases by the 97th section of the Municipal Corporation Act.

Semble, Those remedies would not be applicable in any case to a transaction of this description.

Attorney-General v. Aspinall.

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See DEMURRER, 2.

NEW ORDERS.

See AMENDMENT.

PRACTICE, 2.

NEW TRIAL.

In cases, in which, but for the existence of a trust, the title to real property would be to be tried at law, and a party would consequently have repeated opportunities of trying it, the Court of Chancery is unwilling to bind the rights of the parties by a single trial, especially when it appears likely that more light will be thrown upon the subject by another trial.

A second trial of an issue with respect to a copyhold custom, was directed in a case, in which the result of the first trial would have gone far to establish within an extensive district, a rule of inheritance of which no distinct precedent had been proved in evidence. *Locke v. Colman.* 42

NEXT FRIEND.

See INFANTS.

NUISANCE.

See INJUNCTION.

OCCUPATION RENT.

The Court will not, by an interlocutory order before the hearing, charge a party who is in possession of an estate, and who has been ordered to pay an occupation rent to the receiver, with the amount of such rent for any period antecedent to the date of the order for fixing the rent and appointing the receiver. *Lloyd v. Mason.*

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PARTIES.

Although the husband of an administratrix may have become liable to make good to the next of kin of the intestate the assets received by himself or his wife during the coverture, yet if the husband, at his death, makes his wife his executrix, and she possesses assets more than sufficient to answer the demands of the next of kin, after paying the other debts, the estate of the husband is discharged; and therefore the next of kin cannot sue an administrator *cum testamento annexo* of the husband.

To a bill which seeks an account of the assets of an intestate who died

died in *India*, possessed by a personal representative there, a personal representative of the intestate constituted in *England*, is a necessary party, although it does not appear that the intestate at the time of her death had any assets in *England*. And it is not sufficient, in order to avoid a demurrer for want of parties in such a case, that the personal representative constituted in *India*, who is out of the jurisdiction, is made a party, and that process is prayed against her when within the jurisdiction, although the bill alleges that the *Indian* Court was the proper Court for granting administration, and that the administratrix constituted by it is the sole legal personal representative of the intestate.

Although it is much of course to give leave to amend when a demurrer for want of parties is allowed; yet if the Court sees that the frame of the bill, as it then stands, is not such as entitles the Plaintiff to relief as against the demurring party, leave to amend will be refused. *Tyler v. Bell*. Page 89

See DEMURRER, 1.

PARTNERSHIP.

No play can lawfully be acted for hire, gain, or reward, within twenty miles of *London*, without the authority of letters patent from the King, or of a licence from the Lord Chamberlain; and no such

letters patent or licence can be granted so as to authorise the performance of plays at any place, except within the city or liberties of *Westminster*, or where the King may happen to reside.

An agreement, therefore, for a partnership in acting plays at a theatre situate within twenty miles of *London*, but not within the city or liberties of *Westminster*, or in the place of the King's residence, is one to which the Court will not give effect. *Ewing v. Osbaldiston*.

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PAYMENT INTO COURT.

See INTERPLEADER, 2.

PLEA.

A plea of proceedings in another Court of competent jurisdiction, must shew not only that the same issue was joined as in the suit in this Court, but that the subject-matter was the same, and that the proceedings in the other Court were taken for the same purpose. *Bahrens v. Sieveking*. 602

PLEADING.

See AMENDMENT.

DEMURRER, 1, 2.

INFANTS.

PARTIES.

PLEA.

POWER.

A real estate was settled to the use of a father for life, with remainder to

to the use of all and every or such one or more of his children, for such estate and estates, and in such parts, shares, and proportions, and with such limitations over, and charged with such annual or gross sums, such limitations over and charges to be to or for the benefit of the same children, some or one of them, and in such manner and form as the father should appoint. The father afterwards appointed the estate to trustees and their heirs, upon trust to pay the rents and profits thereof to his daughter, who was a married woman, for her sole and separate use during the life of her husband, without power of anticipation: Held, that the appointment of the estate to trustees for the separate use of the daughter during the joint lives of herself and her husband was a valid exercise of the power. *Thornton v. Bright.* Page 230

PRACTICE.

1. A party against whom an attachment has issued for want of an answer, cannot file an answer and demurrer to the bill, even although no further step in the process has been taken; and it makes no difference in this respect, that the demurrer is only to a part of the discovery sought, and not to the relief. *Vigers v. Lord Audley.* 49
2. When an order has been made at the hearing, directing that the cause shall stand over, but giving the Plaintiff leave to amend by adding parties, if the Plaintiff, after having added some parties, is desirous to add others, he must apply for further leave so to do: and that application must be made to the Court, and not to a Master. *Biedermann v. Seymour.* Page 117
3. Discussion of the principles upon which a specialty creditor whose debt is also secured by a mortgage or lien should prove his debt under a decree in a creditor's suit. 'Sir J. Leach's decision in *Greenwood v. Taylor* (1 Russ. & Mylne, 185.) questioned. *Mason v. Bogg.* 443
4. The Court has a right to advance, at its discretion, any cause which is ripe for hearing. *Semble*, the Lord Chancellor has no jurisdiction to discharge or vary an order made for that purpose by the Master of the Rolls. *Hutchinson v. Stephens.* 452
5. A motion for leave to examine witnesses, and that publication may be in the meantime enlarged, after publication has actually passed, is not an application which comes within the meaning of the 3 & 4 W. 4. c. 94. s. 13., but ought to be made to the Court in the first instance. *Carr v. Appleyard.* 476
6. A party against whom an attachment has issued for disobedience to an order, may, notwithstanding the attachment, move to discharge the order. *Brown v. Newall.* 558
7. Ser-

7. Service of a notice of motion upon a Defendant, before he has appeared to the bill, is irregular, unless the leave of Court has been previously obtained. *Hill v. Rimell.* Page 641

8. A cause may be set down for hearing in the cause book of the same term in which publication has passed, provided it be not set down until after the last day of the term. *Turner v. Hutchon.*

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See AMENDMENT.

COSTS, 2, 3.

INTERPLEADER, 2.

OCCUPATION RENT.

PRIVILEGE.

See CONTEMPT.

PROTECTOR.

See LUNATIC, 3.

RECEIVER.

Receiver granted, at the instance of an executor, pending a suit in the ecclesiastical court, to have the probate annulled; the Defendant, who was the party impeaching the will and setting up an intestacy, having by her own acts prevented the executor from getting in the assets. *Marr v. Littlewood.* 454

REFUNDING.

The circumstance that an intestate's personal estate has been dis-

tributed, in a suit, among the persons appearing to be his sole next of kin, does not necessarily preclude other persons having an equal title to that character, from afterwards instituting a new suit against the next of kin who have been thus overpaid, and compelling them to refund a proportion of their shares. *Sawyer v. Birchmore.* Page 611

RESIDENCE.

See CHARITY, 1.

RESIDUARY DEVISE.

See WILL, 3.

REVOCATION.

By a written contract for the purchase of an estate, it was stipulated that the conveyance should be made to the purchaser, his heirs, appointees, or assigns. The purchaser immediately afterwards made a devise of the estate, and subsequently took a conveyance of it to himself and his heirs, to the usual uses to bar dower: Held, that the devisee could not make such a title as a purchaser would be bound to accept, inasmuch as all the existing authorities shew that the devise was revoked by the subsequent conveyance. *Bullin v. Fletcher.* 432

See WILL, 1.

SERVICE.

See PRACTICE, 7.

SETTLE-

SETTLEMENT.

On a treaty of marriage, carried on in *London*, between the only son of an *English* Marquess and the daughter of a *Scotch* Earl, the terms of a marriage settlement were embodied in a paper, called "Proposals;" which paper was approved by the respective fathers, on behalf of their children. The Proposals stipulated that the Earl should pay or advance, as the portion of his daughter, certain sums of money, at the times and in the manner therein specified; and that in consideration of those sums and of the marriage, the Marquess and his son should concur in charging large estates in *England*, *Ireland*, and the *West Indies*, with certain provisions for the husband, during his father's life, and for the wife and the younger children of the marriage; and subject thereto, should settle the same estates upon the Marquess and his son, successively, for life, with remainders to the issue of the marriage, according to the series of limitations therein specified. The Proposals concluded with a proviso, that the settlement should contain the usual powers of appointing new trustees, the usual clause of indemnity to trustees, and all other usual and necessary clauses. A settlement was then prepared and executed in *London*, to which the intended husband and wife, with

their respective fathers, and certain other persons, as trustees, were parties, and of which the provisions, though different in several particulars, were similar in their general character to the terms contained in the Proposals; and the marriage took effect. Many years afterwards, the Earl, who was a domiciled *Scotchman*, died, leaving a large personal estate; and a suit having been thereupon instituted in *Scotland*, in which all persons, who were competent to contest the question, intervened, it was adjudged by the Court of Session, and also, on appeal, by the House of Lords, that, according to the law of *Scotland*, the daughter of the deceased Earl was entitled to a proportionate share of her father's personal estate, called, in that law, her legitim, inasmuch as she had not renounced that right by her marriage settlement, or otherwise. Very shortly before this decision of the Court of Session, the Proposals, which had been mislaid, were discovered; and the present bill was then filed against the husband and wife, alleging that the settlement had been prepared in pursuance, and on the basis, of the Proposals; that in *Scotland*, a clause barring legitim was a usual and necessary clause, in the marriage settlement of a child, for whom the father thereby advanced a portion; that the proviso in the Proposals was understood by all the contracting parties as applying to and comprising

prising such a clause; that as no such clause was to be found in the settlement, as executed, the settlement did not effectuate the intention of the contract, as expressed in the Proposals; and that it was in this respect erroneous, and ought to be reformed. The bill prayed a declaration accordingly, and that in the meantime the Defendants might be restrained by injunction from proceeding to enforce the decree obtained in the *Scotch* Court for payment of the sum found due to the Defendants on account of the legitim. The Lord Chancellor dissolved the injunction, which had been granted by the Vice-Chancellor, and held,

First, that the proviso was to be construed with reference to the subject-matter and objects of the settlement, which was in the *English* form, and applied exclusively to *English* subject-matter; and that a clause barring legitim, therefore, could not be considered as comprehended under it:

Secondly, that whereas the claim to legitim could only be barred by an express contract, between the father and the daughter, to that effect, the father, in approving of the Proposals, was acting on behalf of his daughter, and not as a party dealing adversely with her, for the purchase or renunciation of her rights.

Thirdly, that there was no sufficient evidence to shew that the Proposals constituted the final

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contract of the parties, and had not been varied by some subsequent agreement, prior to the execution of the settlement.

The Court will not reform a settlement, on the ground of mistake, unless the evidence, as to the mistake, and as to the real intention of the parties, is perfectly clear and satisfactory.

Whether the Court would entertain such a suit, on the ground of the discovery of matter constituting a new case, after the subject of the suit had been adjudicated upon and disposed of by a foreign tribunal of competent jurisdiction, when it did not appear that the new matter might not still be made available before the foreign tribunal, according to the course of proceeding there, *quære*. *The Marquess of Breadalbane v. The Marquess of Chandos*.

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SHIP.

See CONSTRUCTION OF STATUTES.

SHIP REGISTRY ACT.

The Court will entertain a suit for an account of the freight of a ship, grounded on a contract which also contains stipulations affecting to give an ultimate right of property in the ship, and which may not be capable of being recognised or enforced as a whole, for want of being registered; provided the title to the freight is distinct from and does not neces-

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sarily depend upon a title to the ship claimed under such contract.
Davenport v. Whitmore. Page 177

SOLICITOR.

See COSTS, 2, 3.

STATUTES.

1. 3 & 4 W. 4. c. 74. *In the Matter of Newman.* 112
2. 3 & 4 W. 4. c. 27. *Phillipo v. Munnings.* 309
3. 3 & 4 W. 4. c. 94. s. 13. *Carr v. Appleyard.* 476
4. 53 G. 3. c. 159. *Dobree v. Schroder.* 409
5. 6 W. 4. c. 76. *Attorney-General v. Mayor of Norwich.* 406
Attorney-General v. Aspinall. 613
6. 1 W. 4. c. 60. *In the Matter of Prideaux.* 640

SURETY.

See CONSTRUCTION, 3.

TAXATION.

See COSTS, 2, 3.

THEATRE.

See PARTNERSHIP.

TRUST.

See BREACH OF TRUST.
 LIMITATION ACT.
 WILL, 2.

TRUSTEES.

See BREACH OF TRUST.
 CHARITY, 2.
 DEMURRER, 2.
 INFANTS.

VENDOR AND PURCHASER.

By conditions of sale it was stipulated that the vendor of an estate which was sold in lots should deliver an abstract of the title to the purchasers, and deduce a good title, but that as to a part of the estate, acquired under an inclosure, he should not be bound to shew any title thereto prior to the award; and it was farther stipulated that the vendor should deliver up to the largest purchaser in value all the title deeds and other documents in his custody, but should not be required to produce any original deed or other documents than those in his possession and set forth in the abstract: Held, on the construction of these conditions, that they did not relieve the vendor from his liability to verify the title shewn upon the abstract by producing the title deeds themselves, or, if any of them were not in his possession, by other satisfactory evidence.

If a vendor intends to deprive a purchaser of the right to the production of any evidence necessary to verify the title beyond what the

the title deeds in his own custody will supply, he is bound to make that intention previously known to the purchaser in clear and explicit terms. *Southby v. Hutt.*

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VERIFICATION OF ABSTRACT.

See VENDOR AND PURCHASER.

VISITOR.

See CHARITY, 1.
COLLEGE.

WARD OF COURT.

The Court will not make an order, permitting the removal of its infant wards out of the jurisdiction, for the purpose of residing permanently abroad, except in a case of imperative necessity; as, where it is clearly proved that a constant residence in a warmer climate is absolutely essential to their health.

Such an order, if made, ought to comprise a scheme for the education of the infants, as well as a provision for informing the Court from time to time of their progress and condition, and an undertaking to bring them within the jurisdiction when required. *Campbell v. Mackay.*

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WILL.

1. A testator by his will gave 3000*l.* to his brother *B.* for life, with re-

mainder, as to 1000*l.*, to his wife for life; remainder, as to the whole, to his children; he then gave 6000*l.* to his sister *S.* for life, with remainder to her husband for life, remainder to her children; and, after bequeathing 10*l.* a year to each of his two maid servants for their lives, he gave all his real estate, and the residue of his personal estate, to his sister *H.* absolutely. By a testamentary paper, described as a codicil to his will, he left his brother *B.* an equal share of his effects with his sisters, to have the interest for his life, with remainder to his children, subject to a life interest in 1000*l.* to his wife, if living at his death; and his sister *S.* was to have an equal share with his sister *H.* By a subsequent testamentary paper, also described as a codicil, he left his two maid servants 10*l.* a year each for their lives, and nominated a person to act as trustee with the executors named in the will:

Held, upon the effect of all the testamentary papers taken together, that the will, though modified, was not wholly revoked by the first codicil; and that, in lieu of the 6000*l.* legacy given them by the will, *S.* and her children were entitled to one third share of the personal estate, in the same manner and subject to the same limitations as had been expressed by the will with respect to that legacy. *Cookson v. Hancock.*

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2. A testatrix by her will bequeathed all her personal estate to *C.*, whom she appointed one of her executors, for his own use and benefit for ever, trusting and wholly confiding in his honour, that he would act in strict conformity with her wishes. Afterwards, on the same day, she executed a testamentary paper, which contained a list of a number of persons by name, and, among others, the name of the person who was her sole next of kin, with the several sums to be given to them respectively, and concluded with a declaration that such was the testatrix's wish:

Held, upon appeal, that *C.* took the personal estate for his own use absolutely, subject only to the payment of the legacies specified in the testamentary paper, and of three other sums, which *C.* by his answer admitted that the testatrix had directed him, and which he submitted to pay. *Wood v. Cox.* Page 684

3. A testator, after bequeathing a number of pecuniary legacies to different persons, and giving a certain field to his godson, directed that all his debts and the above legacies, should be paid and discharged within six months after his decease; and all the rest and residue of his estate, both real and personal, he gave to *N.* The personal estate proving insufficient to pay the debts and legacies, it was held, upon demurrer to a bill by some of the legatees seeking to charge their legacies on the real estate which passed under the residuary devise to *N.*,

First, that there was no equity in favour of pecuniary legatees, to have the assets marshalled, so as to throw the debts upon the real estate devised to *N.*; but,

Secondly, that both the debts and legacies were, by the words of the will, effectually charged upon that estate. *Mirehouse v. Scaife.* Page 695

END OF THE SECOND VOLUME.

LONDON :

Printed by A. SPOTTISWOODE,
New-Street-Square.

APPENDIX.

*ORDERS for better regulating the Hearing of Causes
and other Matters in the Court of Chancery.*

COURT OF CHANCERY.

5th May, 1837.

The Right Honourable CHARLES CHRISTOPHER Lord COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY Lord LANGDALE, Master of the Rolls, and the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, doth hereby order and direct in manner following; that is to say, —

I. THAT, from and after the 20th day of May now instant, every original information or bill of complaint filed in the High Court of Chancery, shall (at the option of the party, informant or complainant, by or on whose behalf the information or bill shall be filed) be distinctly marked at or near the top or upper part thereof, either with the words "Lord Chancellor," or with the words "Master of the Rolls:" And that the Six Clerk and Clerk in Court, to whom the filing of the information or bill belongs, shall, in the books and indexes in which the same shall be entered, add to the entry thereof such distinguishing words or mark as may make it appear from such entry whether the information or bill is marked with the words "Lord Chancellor," or with the words "Master of the Rolls:" and that, from and after the said 20th day of May, the Six Clerks and Clerks in Court are not to file any original information or bill of complaint which shall not be marked in the manner hereinbefore directed.

II. THAT, in every cause in which the original information or bill shall be marked with the words "Lord Chancellor," or with the words "Master of the Rolls," the Six Clerk to whom it belongs to give or sign the certificate that the cause is ready for hearing shall, upon

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being applied to for such certificate, see that the same certificate is marked, or cause the same to be marked, with the words "Lord Chancellor," or with the words "Master of the Rolls," in conformity with the like words marked on the original information or bill.

III. THAT, in every cause now in Court, but which has not yet been set down for hearing, the Clerk in Court who, on the behalf of the informant, or of the plaintiff or defendant, shall, at any time after the 20th day of May instant, apply to the Six Clerk to set down the cause for hearing, or for the certificate that the cause is ready for hearing, shall state or certify to such Six Clerk whether any orders or order disposing of any pleas or plea, demurrers or demurrer, or any special orders or order upon merits shewn by answer or by affidavit, have or has been made in the cause, or (in case no such order as aforesaid has been made) whether the party on whose behalf the application is made desires the cause to be heard before the Lord Chancellor or the Master of the Rolls; and in case the Clerk in Court so applying shall certify that any such order as aforesaid has been made by the Lord Chancellor or Vice-Chancellor, and not by the Master of the Rolls, or that such orders as aforesaid have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but that the last of such orders has been made by the Lord Chancellor or Vice-Chancellor, or (in case no such order has been made in the cause) that the party desires the cause to be heard before the Lord Chancellor, the Six Clerk giving the certificate shall see that the same certificate is marked, or shall cause the same to be marked, with the words "Lord Chancellor;" and the Six Clerk and Clerk in Court shall cause the entries of the cause in their books and indexes to be marked with such distinguishing words or marks as shall signify that the cause is to be heard before the Lord Chancellor; and in case the Clerk in Court so applying as aforesaid shall certify that any such order as aforesaid has been made by the Master of the Rolls, and not by the Lord Chancellor or Vice-Chancellor, or that such orders as aforesaid have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but that the last of such orders has been made by the Master of the Rolls, or (in case no such order as aforesaid has been made in the cause) that the party

desires the cause to be heard before the Master of the Rolls, the Six Clerk giving the certificate shall see that the same certificate is marked, or shall cause the same to be marked, with the words "Master of the Rolls;" and the Six Clerk and Clerk in Court shall cause the entries of the cause in their books and indexes to be marked with such distinguishing words or marks as shall signify that the cause is to be heard before the Master of the Rolls.

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IV. THAT the Registrars of the Court, and the Secretaries of the Lord Chancellor and of the Master of the Rolls, are not at any time after the said 20th day of May instant, to set down to be heard any cause in which the certificate of the cause being ready for hearing shall not be marked in the manner directed by the 2d and 3rd Orders, and are not, after the date of these Orders, to set down to be heard before the Master of the Rolls any cause, further directions, or exceptions, which is or are now set down to be heard before the Lord Chancellor, and are not, without special order of the Lord Chancellor, to set down to be heard before the Lord Chancellor any cause, further directions, or exceptions, which is or are now set down to be heard before the Master of the Rolls.

V. THAT in every petition praying that a day may be appointed for arguing a plea or demurrer put in to any information or bill filed on or after the said 20th day of May, it shall be stated whether the information or bill to which such plea or demurrer is put in is marked with the words "Lord Chancellor," or with the words "Master of the Rolls."

VI. THAT, from and after the said 20th day of May instant, the several causes and matters hereinafter mentioned, not already set down, shall be set down to be heard before the Lord Chancellor, and shall not without special order of the Lord Chancellor be set down to be heard before the Master of the Rolls.

1. Every plea or demurrer, and all exceptions in any cause in which the information or bill shall be marked with the words "Lord Chancellor," or in which the entries of the cause in the Six Clerks' books shall be so marked as to signify that the same is to be heard before the Lord Chancellor.

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2. Every cause in which the certificate of the cause being ready for hearing shall be marked with the words "Lord Chancellor."

3. Every cause requiring to be heard for further directions, or on the equity reserved, and in which the Master's report has been or shall be made, or a trial at law has been or shall be had, or the certificate of a court of common law has been or shall be obtained in pursuance of a decree or order pronounced by the Lord Chancellor or Vice-Chancellor.

4. Every exception or set of exceptions taken to any report made by a Master in ordinary, in pursuance of a decree, or an order of reference (not being an order obtained as of course), made by the Lord Chancellor or the Vice-Chancellor.

VII. THAT, from and after the said 20th day of May instant, every petition presented or motion made under or pursuant to the liberty to apply contained in any decree or decretal order of the Lord Chancellor or Vice-Chancellor, shall, as to petitions, be addressed to and set down to be heard before the Lord Chancellor, and shall, as to motions, be made before the Lord Chancellor or Vice-Chancellor; and that no such petition or motion shall, without special order of the Lord Chancellor, be addressed to or made before the Master of the Rolls.

VIII. THAT all such pleas, demurrers, causes, further directions, exceptions, and petitions, to be so set down to be heard before the Lord Chancellor, as hereinbefore is directed, shall be heard and determined in the same manner, and be subject to the same rules, as pleas, demurrers, causes, further directions, exceptions, and petitions set down before the Lord Chancellor, have heretofore been heard and determined.

IX. THAT, from and after the said 20th day of May instant, all interlocutory applications by way of motion or petition (other than applications for orders of course), shall, in the several cases hereinafter mentioned, be made to the Lord Chancellor or to the Vice-Chancellor, and shall not, without special order of the Lord Chancellor, be made to the Master of the Rolls; viz. in the several cases following:—

1. Where the original information or bill is marked with the words "Lord Chancellor."

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2. Where the cause has not been set down for hearing, and any order disposing of any plea or demurrer or any special order upon merits, shewn by answer or by affidavit, has been made in the cause by the Lord Chancellor or Vice-Chancellor, and no such order has been made by the Master of the Rolls.

3. Where the cause has not been set down for hearing, and orders disposing of pleas or demurrers, or special orders upon merits shewn by answer or affidavit, have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but the last of such orders was made by the Lord Chancellor or Vice-Chancellor.

4. Where the cause has been set down for hearing before the Lord Chancellor, either for original hearing or for further directions, or on the equity reserved.

5. Where the decree or last decretal order was made by the Lord Chancellor or Vice-Chancellor, except in cases where the decree or last decretal order was made by the Lord Chancellor on a re-hearing of a decree or decretal order made by the Master of the Rolls.

X. THAT, from and after the said 20th day of May instant, the several causes and matters hereinafter mentioned, not already set down, shall be set down to be heard before the Master of the Rolls, and shall not, otherwise than for the purpose of re-hearing, be set down to be heard before the Lord Chancellor.

1. Every plea or demurrer, and all exceptions in any cause in which the information or bill shall be marked with the words "Master of the Rolls;" or in which the entries of the cause in the Six Clerks' books shall be so marked as to signify that the same is to be heard before the Master of the Rolls.

2. Every cause in which the certificate of the same being ready for hearing shall be marked with the words "Master of the Rolls."

3. Every cause requiring to be heard for further directions or on the equity reserved, and in which the Master's report has been or shall be made, or a trial at law has been or shall be had, or the certificate of a Court of Common Law has been or shall be obtained, in pursuance of a decree or order pronounced by the Master of the Rolls.

4. Every exception, or set of exceptions, taken to any report made by a Master in ordinary, pursuant to a de-

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cree or an order of reference (not being an order obtained as of course) made by the Master of the Rolls.

XI. THAT, from and after the said 20th day of May instant, every petition presented, or motion made, under or pursuant to the liberty to apply contained in any decree or decretal order of the Master of the Rolls, shall be addressed to and set down to be heard, or shall be made, before the Master of the Rolls: and that, except for the purpose of re-hearing an order of the Master of the Rolls, no such petition or motion shall be addressed to or made before the Lord Chancellor.

XII. THAT, from and after the said 20th day of May instant, all interlocutory applications, by way of motion or petition (other than applications for orders of course), shall, in the several cases hereinafter mentioned, be made to the Master of the Rolls, and shall not, except for the purpose of re-hearing an order of the Master of the Rolls, be made to the Lord Chancellor; viz. in the several cases following:—

1. Where the original information or bill is marked with the words “Master of the Rolls.”

2. Where the cause has not been set down for hearing, and any order disposing of any plea or demurrer, or any special order upon merits shewn by answer or affidavit, has been made in the cause by the Master of the Rolls, and no such order has been made by the Lord Chancellor or Vice-Chancellor.

3. Where the cause has not been set down for hearing, and orders disposing of pleas or demurrers, or special order upon merits shewn by answer or affidavit, have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but the last of such orders has been made by the Master of the Rolls.

4. Where the cause has been set down for hearing before the Master of the Rolls, either for original hearing or for further directions, or on the equity reserved, and is not now set down to be so heard before the Lord Chancellor.

5. Where the decree or last decretal order was made by the Master of the Rolls or by the Lord Chancellor, on the re-hearing of a decree or decretal order of the Master of the Rolls.

XIII. THAT the above Orders as to interlocutory applications shall not extend to any applications for orders of course, nor to any petitions presented, or notices of motion given, before the 18th day of May instant.

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XIV. THAT all applications for orders of course to be obtained on petition or motion shall and may be made in the same manner in all respects as if the above Orders had not been made; but as to all cases in which, according to the 9th preceding Order, interlocutory applications (other than applications for orders of course) are directed to be made before the Lord Chancellor or Vice-Chancellor, if any order nisi, upon which cause against making the order absolute is to be shewn to the Court, shall be obtained as of course from the Master of the Rolls, such cause shall be shewn before the Lord Chancellor or Vice-Chancellor; and if any order of reference to the Master in ordinary shall be obtained as of course from the Master of the Rolls, and the Master's report pursuant to such order of reference shall be excepted to, the exceptions thereto shall be heard before the Lord Chancellor or the Vice-Chancellor: and in all cases in which, according to the 12th preceding Order, interlocutory applications (other than applications for orders of course) are directed to be made before the Master of the Rolls, if any order nisi, upon which cause against making the order absolute is to be shewn to the Court, shall be obtained as of course from the Lord Chancellor or Vice-Chancellor, such cause shall be shewn before the Master of the Rolls; and if any order of reference to the Master in ordinary shall be obtained as of course from the Lord Chancellor or Vice-Chancellor, and the Master's report pursuant to such order of reference shall be excepted to, the exceptions thereto shall be heard before the Master of the Rolls.

XV. THAT, in the interval between the close of the sittings after any term and the commencement of the sittings before or at the beginning of the next ensuing term, applications for special orders may be made to any Judge of the Court in the same manner as if these Orders had not been made; but that the orders which shall be made in any such interval by the Lord Chancellor, or by the Master of the Rolls, or by the Vice-

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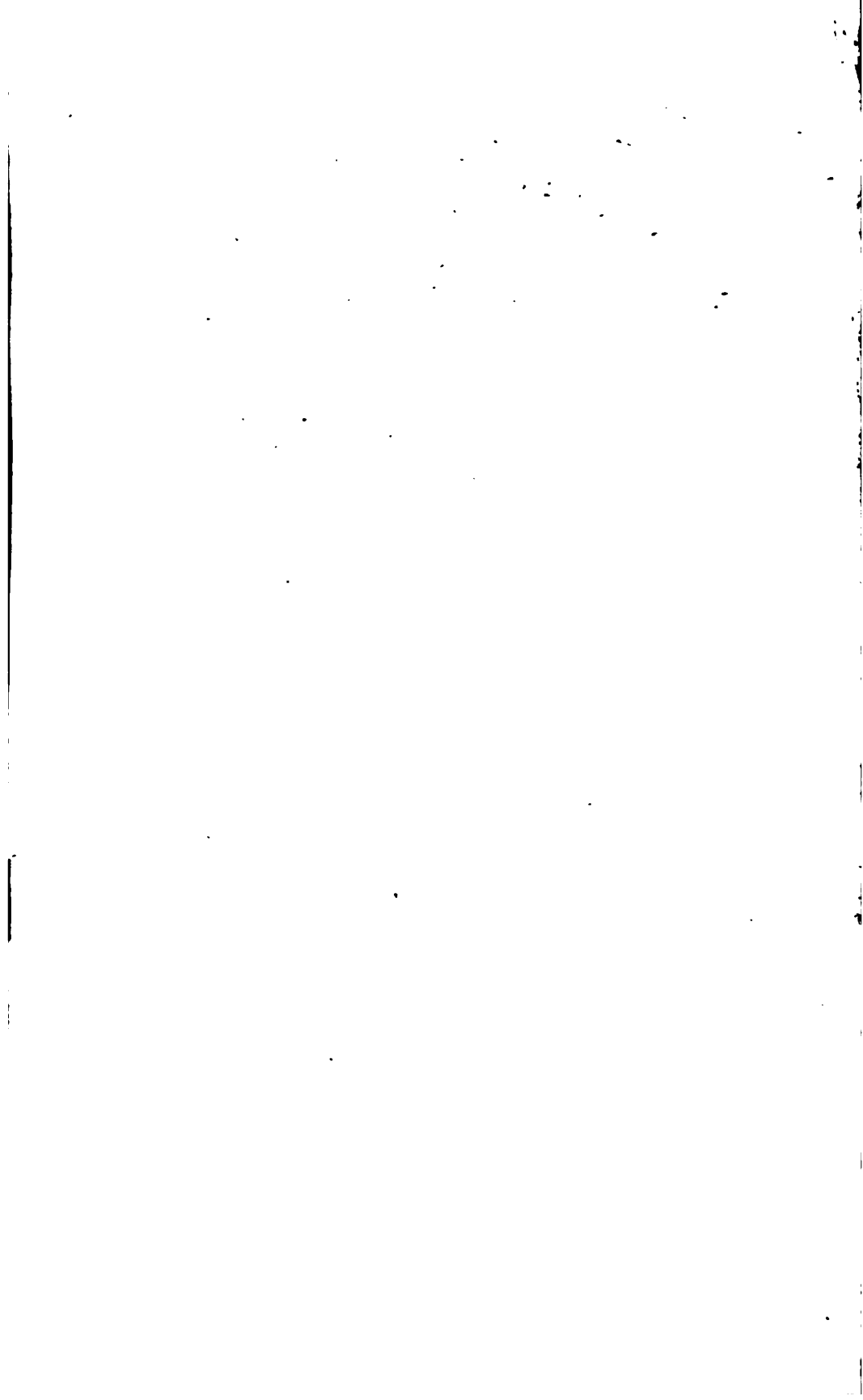
Chancellor, shall, if not made by the Judge to whom the application, if made during the ordinary sittings of the Court, would have been made pursuant to the directions contained in these Orders, be marked as having been made for such Judge, and shall in the future proceedings of the cause be deemed to be the order of such Judge in all respects save this, — that no order so made by one Judge for another under the circumstances aforesaid shall be re-heard for the purpose of being discharged or varied otherwise than by the Lord Chancellor.

XVI. THAT, from and after the said 20th day of May instant, all matters which, under and by virtue of any Act of Parliament or otherwise, the Court hath jurisdiction to hear and determine in a summary way, and which shall be in the first instance brought under the consideration of the Court upon a petition presented to the Lord Chancellor, shall in any subsequent stage of the proceedings respecting the same matters be heard and determined by the Lord Chancellor or Vice-Chancellor; and that no petition respecting the same matters in any subsequent stage of the proceedings relating thereto, shall, without special order of the Lord Chancellor, be set down to be heard before the Master of the Rolls; and that all such matters as aforesaid which shall be in the first instance brought under the consideration of the Court upon a petition to the Master of the Rolls, shall, in any subsequent stage of the proceedings respecting the same matters, be heard and determined by the Master of the Rolls; and that no petition respecting the same matters in any subsequent stage of the proceedings relating thereto, shall, otherwise than for the purpose of re-hearing an order of the Master of the Rolls, be set down to be heard before the Lord Chancellor.

COTTENHAM, C.
LANGDALE, M. R.
LANCELOT SHADWELL, V. C.

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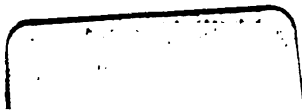
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SETTLEMENT.

On a treaty of marriage, carried on in *London*, between the only son of an *English* Marquess and the daughter of a *Scotch* Earl, the terms of a marriage settlement were embodied in a paper, called "Proposals;" which paper was approved by the respective fathers, on behalf of their children. The Proposals stipulated that the Earl should pay or advance, as the portion of his daughter, certain sums of money, at the times and in the manner therein specified; and that in consideration of those sums and of the marriage, the Marquess and his son should concur in charging large estates in *England*, *Ireland*, and the *West Indies*, with certain provisions for the husband, during his father's life, and for the wife and the younger children of the marriage; and subject thereto, should settle the same estates upon the Marquess and his son, successively, for life, with remainders to the issue of the marriage, according to the series of limitations therein specified. The Proposals concluded with a proviso, that the settlement should contain the usual powers of appointing new trustees, the usual clause of indemnity to trustees, and all other usual and necessary clauses. A settlement was then prepared and executed in *London*, to which the intended husband and wife, with

their respective fathers, and certain other persons, as trustees, were parties, and of which the provisions, though different in several particulars, were similar in their general character to the terms contained in the Proposals; and the marriage took effect. Many years afterwards, the Earl, who was a domiciled *Scotchman*, died, leaving a large personal estate; and a suit having been thereupon instituted in *Scotland*, in which all persons, who were competent to contest the question, intervened, it was adjudged by the Court of Session, and also, on appeal, by the House of Lords, that, according to the law of *Scotland*, the daughter of the deceased Earl was entitled to a proportionate share of her father's personal estate, called, in that law, her legitim, inasmuch as she had not renounced that right by her marriage settlement, or otherwise. Very shortly before this decision of the Court of Session, the Proposals, which had been mislaid, were discovered; and the present bill was then filed against the husband and wife, alleging that the settlement had been prepared in pursuance, and on the basis, of the Proposals; that in *Scotland*, a clause barring legitim was a usual and necessary clause, in the marriage settlement of a child, for whom the father thereby advanced a portion; that the proviso in the Proposals was understood by all the contracting parties as applying to and comprising

prising such a clause; that as no such clause was to be found in the settlement, as executed, the settlement did not effectuate the intention of the contract, as expressed in the Proposals; and that it was in this respect erroneous, and ought to be reformed. The bill prayed a declaration accordingly, and that in the meantime the Defendants might be restrained by injunction from proceeding to enforce the decree obtained in the *Scotch* Court for payment of the sum found due to the Defendants on account of the legitim. The Lord Chancellor dissolved the injunction, which had been granted by the Vice-Chancellor, and held,

First, that the proviso was to be construed with reference to the subject-matter and objects of the settlement, which was in the *English* form, and applied exclusively to *English* subject-matter; and that a clause barring legitim, therefore, could not be considered as comprehended under it:

Secondly, that whereas the claim to legitim could only be barred by an express contract, between the father and the daughter, to that effect, the father, in approving of the Proposals, was acting on behalf of his daughter, and not as a party dealing adversely with her, for the purchase or renunciation of her rights.

Thirdly, that there was no sufficient evidence to shew that the Proposals constituted the final

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contract of the parties, and had not been varied by some subsequent agreement, prior to the execution of the settlement.

The Court will not reform a settlement, on the ground of mistake, unless the evidence, as to the mistake, and as to the real intention of the parties, is perfectly clear and satisfactory.

Whether the Court would entertain such a suit, on the ground of the discovery of matter constituting a new case, after the subject of the suit had been adjudicated upon and disposed of by a foreign tribunal of competent jurisdiction, when it did not appear that the new matter might not still be made available before the foreign tribunal, according to the course of proceeding there, *quære*. *The Marquess of Breadalbane v. The Marquess of Chandos*.

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SHIP.

See CONSTRUCTION OF STATUTES.

SHIP REGISTRY ACT.

The Court will entertain a suit for an account of the freight of a ship, grounded on a contract which also contains stipulations affecting to give an ultimate right of property in the ship, and which may not be capable of being recognised or enforced as a whole, for want of being registered; provided the title to the freight is distinct from and does not neces-

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sarily depend upon a title to the ship claimed under such contract.
Davenport v. Whitmore. Page 177

SOLICITOR.

See COSTS, 2, 3.

STATUTES.

1. 3 & 4 W. 4. c. 74. *In the Matter of Newman.* 112
2. 3 & 4 W. 4. c. 27. *Phillipo v. Munnings.* 309
3. 3 & 4 W. 4. c. 94. s. 13. *Carr v. Appleyard.* 476
4. 53 G. 3. c. 159. *Dobree v. Schroder.* 409
5. 6 W. 4. c. 76. *Attorney-General v. Mayor of Norwich.* 406
Attorney-General v. Aspinall. 613
6. 1 W. 4. c. 60. *In the Matter of Prideaux.* 640

SURETY.

See CONSTRUCTION, 3.

TAXATION.

See COSTS, 2, 3.

THEATRE.

See PARTNERSHIP.

TRUST.

See BREACH OF TRUST.
 LIMITATION ACT.
 WILL, 2.

TRUSTEES.

See BREACH OF TRUST.
 CHARITY, 2.
 DEMURRER, 2.
 INFANTS.

VENDOR AND PURCHASER.

By conditions of sale it was stipulated that the vendor of an estate which was sold in lots should deliver an abstract of the title to the purchasers, and deduce a good title, but that as to a part of the estate, acquired under an inclosure, he should not be bound to shew any title thereto prior to the award; and it was farther stipulated that the vendor should deliver up to the largest purchaser in value all the title deeds and other documents in his custody, but should not be required to produce any original deed or other documents than those in his possession and set forth in the abstract: Held, on the construction of these conditions, that they did not relieve the vendor from his liability to verify the title shewn upon the abstract by producing the title deeds themselves, or, if any of them were not in his possession, by other satisfactory evidence.

If a vendor intends to deprive a purchaser of the right to the production of any evidence necessary to verify the title beyond what the

the title deeds in his own custody will supply, he is bound to make that intention previously known to the purchaser in clear and explicit terms. *Southby v. Hutt.*

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VERIFICATION OF ABSTRACT.

See VENDOR AND PURCHASER.

VISITOR.

See CHARITY, 1.
COLLEGE.

WARD OF COURT.

The Court will not make an order, permitting the removal of its infant wards out of the jurisdiction, for the purpose of residing permanently abroad, except in a case of imperative necessity; as, where it is clearly proved that a constant residence in a warmer climate is absolutely essential to their health.

Such an order, if made, ought to comprise a scheme for the education of the infants, as well as a provision for informing the Court from time to time of their progress and condition, and an undertaking to bring them within the jurisdiction when required. *Campbell v. Mackay.*

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WILL.

1. A testator by his will gave 3000*l.* to his brother *B.* for life, with re-

mainder, as to 1000*l.*, to his wife for life; remainder, as to the whole, to his children; he then gave 6000*l.* to his sister *S.* for life, with remainder to her husband for life, remainder to her children; and, after bequeathing 10*l.* a year to each of his two maid servants for their lives, he gave all his real estate, and the residue of his personal estate, to his sister *H.* absolutely. By a testamentary paper, described as a codicil to his will, he left his brother *B.* an equal share of his effects with his sisters, to have the interest for his life, with remainder to his children, subject to a life interest in 1000*l.* to his wife, if living at his death; and his sister *S.* was to have an equal share with his sister *H.* By a subsequent testamentary paper, also described as a codicil, he left his two maid servants 10*l.* a year each for their lives, and nominated a person to act as trustee with the executors named in the will:

Held, upon the effect of all the testamentary papers taken together, that the will, though modified, was not wholly revoked by the first codicil; and that, in lieu of the 6000*l.* legacy given them by the will, *S.* and her children were entitled to one third share of the personal estate, in the same manner and subject to the same limitations as had been expressed by the will with respect to that legacy. *Cookson v. Hancock.*

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2. A testatrix by her will bequeathed all her personal estate to *C.*, whom she appointed one of her executors, for his own use and benefit for ever, trusting and wholly confiding in his honour, that he would act in strict conformity with her wishes. Afterwards, on the same day, she executed a testamentary paper, which contained a list of a number of persons by name, and, among others, the name of the person who was her sole next of kin, with the several sums to be given to them respectively, and concluded with a declaration that such was the testatrix's wish:
- Held, upon appeal, that *C.* took the personal estate for his own use absolutely, subject only to the payment of the legacies specified in the testamentary paper, and of three other sums, which *C.* by his answer admitted that the testatrix had directed him, and which he submitted to pay. *Wood v. Cox.* Page 684
3. A testator, after bequeathing a number of pecuniary legacies, to different persons, and giving a certain field to his godson, directed that all his debts and the above legacies, should be paid and discharged within six months after his decease; and all the rest and residue of his estate, both real and personal, he gave to *N.* The personal estate proving insufficient to pay the debts and legacies, it was held, upon demurrer to a bill by some of the legatees seeking to charge their legacies on the real estate which passed under the residuary devise to *N.*,
- First, that there was no equity in favour of pecuniary legatees, to have the assets marshalled, so as to throw the debts upon the real estate devised to *N.*; but,
- Secondly, that both the debts and legacies were, by the words of the will, effectually charged upon that estate. *Mirehouse v. Scaife.* Page 695

END OF THE SECOND VOLUME.

APPENDIX.

*ORDERS for better regulating the Hearing of Causes
and other Matters in the Court of Chancery.*

COURT OF CHANCERY.

5th May, 1837.

The Right Honourable CHARLES CHRISTOPHER Lord COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY Lord LANGDALE, Master of the Rolls, and the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, doth hereby order and direct in manner following; that is to say,—

I. THAT, from and after the 20th day of May now instant, every original information or bill of complaint filed in the High Court of Chancery, shall (at the option of the party, informant or complainant, by or on whose behalf the information or bill shall be filed) be distinctly marked at or near the top or upper part thereof, either with the words "Lord Chancellor," or with the words "Master of the Rolls:." And that the Six Clerk and Clerk in Court, to whom the filing of the information or bill belongs, shall, in the books and indexes in which the same shall be entered, add to the entry thereof such distinguishing words or mark as may make it appear from such entry whether the information or bill is marked with the words "Lord Chancellor," or with the words "Master of the Rolls:." and that, from and after the said 20th day of May, the Six Clerks and Clerks in Court are not to file any original information or bill of complaint which shall not be marked in the manner hereinbefore directed.

II. THAT, in every cause in which the original information or bill shall be marked with the words "Lord Chancellor," or with the words "Master of the Rolls," the Six Clerk to whom it belongs to give or sign the certificate that the cause is ready for hearing shall, upon

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2. A testatrix by her will bequeathed all her personal estate to C., whom she appointed one of her executors, for his own use and benefit for ever, trusting and wholly confiding in his honour, that he would act in strict conformity with her wishes. Afterwards, on the same day, she executed a testamentary paper, which contained a list of a number of persons by name, and, among others, the name of the person who was her sole next of kin, with the several sums to be given to them respectively, and concluded with a declaration that such was the testatrix's wish:
- Held, upon appeal, that C. took the personal estate for his own use absolutely, subject only to the payment of the legacies specified in the testamentary paper, and of three other sums, which C. by his answer admitted that the testatrix had directed him, and which he submitted to pay. *Wood v. Cox.* Page 684
3. A testator, after bequeathing a number of pecuniary legacies to different persons, and giving a certain field to his godson, directed that all his debts and the above legacies, should be paid and discharged within six months after his decease; and all the rest and residue of his estate, both real and personal, he gave to N. The personal estate proving insufficient to pay the debts and legacies, it was held, upon demurrer to a bill by some of the legatees seeking to charge their legacies on the real estate which passed under the residuary devise to N.,
- First, that there was no equity in favour of pecuniary legatees, to have the assets marshalled, so as to throw the debts upon the real estate devised to N.; but,
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I. THAT, from and after the 20th day of May now instant, every original information or bill of complaint filed in the High Court of Chancery, shall (at the option of the party, informant or complainant, by or on whose behalf the information or bill shall be filed) be distinctly marked at or near the top or upper part thereof, either with the words “ Lord Chancellor,” or with the words “ Master of the Rolls:” And that the Six Clerk and Clerk in Court, to whom the filing of the information or bill belongs, shall, in the books and indexes in which the same shall be entered, add to the entry thereof such distinguishing words or mark as may make it appear from such entry whether the information or bill is marked with the words “ Lord Chancellor,” or with the words “ Master of the Rolls:” and that, from and after the said 20th day of May, the Six Clerks and Clerks in Court are not to file any original information or bill of complaint which shall not be marked in the manner hereinbefore directed.

II. THAT, in every cause in which the original information or bill shall be marked with the words “ Lord Chancellor,” or with the words “ Master of the Rolls,” the Six Clerk to whom it belongs to give or sign the certificate that the cause is ready for hearing shall, upon

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being applied to for such certificate, see that the same certificate is marked, or cause the same to be marked, with the words "Lord Chancellor," or with the words "Master of the Rolls," in conformity with the like words marked on the original information or bill.

III. THAT, in every cause now in Court, but which has not yet been set down for hearing, the Clerk in Court who, on the behalf of the informant, or of the plaintiff or defendant, shall, at any time after the 20th day of May instant, apply to the Six Clerk to set down the cause for hearing, or for the certificate that the cause is ready for hearing, shall state or certify to such Six Clerk whether any orders or order disposing of any pleas or plea, demurrers or demurrer, or any special orders or order upon merits shewn by answer or by affidavit, have or has been made in the cause, or (in case no such order as aforesaid has been made) whether the party on whose behalf the application is made desires the cause to be heard before the Lord Chancellor or the Master of the Rolls; and in case the Clerk in Court so applying shall certify that any such order as aforesaid has been made by the Lord Chancellor or Vice-Chancellor, and not by the Master of the Rolls, or that such orders as aforesaid have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but that the last of such orders has been made by the Lord Chancellor or Vice-Chancellor, or (in case no such order has been made in the cause) that the party desires the cause to be heard before the Lord Chancellor, the Six Clerk giving the certificate shall see that the same certificate is marked, or shall cause the same to be marked, with the words "Lord Chancellor;" and the Six Clerk and Clerk in Court shall cause the entries of the cause in their books and indexes to be marked with such distinguishing words or marks as shall signify that the cause is to be heard before the Lord Chancellor; and in case the Clerk in Court so applying as aforesaid shall certify that any such order as aforesaid has been made by the Master of the Rolls, and not by the Lord Chancellor or Vice-Chancellor, or that such orders as aforesaid have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but that the last of such orders has been made by the Master of the Rolls, or (in case no such order as aforesaid has been made in the cause) that the party

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desires the cause to be heard before the Master of the Rolls, the Six Clerk giving the certificate shall see that the same certificate is marked, or shall cause the same to be marked, with the words "Master of the Rolls;" and the Six Clerk and Clerk in Court shall cause the entries of the cause in their books and indexes to be marked with such distinguishing words or marks as shall signify that the cause is to be heard before the Master of the Rolls.

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IV. THAT the Registrars of the Court, and the Secretaries of the Lord Chancellor and of the Master of the Rolls, are not at any time after the said 20th day of May instant, to set down to be heard any cause in which the certificate of the cause being ready for hearing shall not be marked in the manner directed by the 2d and 3rd Orders, and are not, after the date of these Orders, to set down to be heard before the Master of the Rolls any cause, further directions, or exceptions, which is or are now set down to be heard before the Lord Chancellor, and are not, without special order of the Lord Chancellor, to set down to be heard before the Lord Chancellor any cause, further directions, or exceptions, which is or are now set down to be heard before the Master of the Rolls.

V. THAT in every petition praying that a day may be appointed for arguing a plea or demurrer put in to any information or bill filed on or after the said 20th day of May, it shall be stated whether the information or bill to which such plea or demurrer is put in is marked with the words "Lord Chancellor," or with the words "Master of the Rolls."

VI. THAT, from and after the said 20th day of May instant, the several causes and matters hereinafter mentioned, not already set down, shall be set down to be heard before the Lord Chancellor, and shall not without special order of the Lord Chancellor be set down to be heard before the Master of the Rolls.

1. Every plea or demurrer, and all exceptions in any cause in which the information or bill shall be marked with the words "Lord Chancellor," or in which the entries of the cause in the Six Clerks' books shall be so marked as to signify that the same is to be heard before the Lord Chancellor.

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2. Every cause in which the certificate of the cause being ready for hearing shall be marked with the words "Lord Chancellor."

3. Every cause requiring to be heard for further directions, or on the equity reserved, and in which the Master's report has been or shall be made, or a trial at law has been or shall be had, or the certificate of a court of common law has been or shall be obtained in pursuance of a decree or order pronounced by the Lord Chancellor or Vice-Chancellor.

4. Every exception or set of exceptions taken to any report made by a Master in ordinary, in pursuance of a decree, or an order of reference (not being an order obtained as of course), made by the Lord Chancellor or the Vice-Chancellor.

VII. THAT, from and after the said 20th day of May instant, every petition presented or motion made under or pursuant to the liberty to apply contained in any decree or decretal order of the Lord Chancellor or Vice-Chancellor, shall, as to petitions, be addressed to and set down to be heard before the Lord Chancellor, and shall, as to motions, be made before the Lord Chancellor or Vice-Chancellor; and that no such petition or motion shall, without special order of the Lord Chancellor, be addressed to or made before the Master of the Rolls.

VIII. THAT all such pleas, demurrers, causes, further directions, exceptions, and petitions, to be so set down to be heard before the Lord Chancellor, as hereinbefore is directed, shall be heard and determined in the same manner, and be subject to the same rules, as pleas, demurrers, causes, further directions, exceptions, and petitions set down before the Lord Chancellor, have heretofore been heard and determined.

IX. THAT, from and after the said 20th day of May instant, all interlocutory applications by way of motion or petition (other than applications for orders of course), shall, in the several cases hereinafter mentioned, be made to the Lord Chancellor or to the Vice-Chancellor, and shall not, without special order of the Lord Chancellor, be made to the Master of the Rolls; viz. in the several cases following:—

1. Where the original information or bill is marked with the words "Lord Chancellor."

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2. Where the cause has not been set down for hearing, and any order disposing of any plea or demurrer or any special order upon merits, shewn by answer or by affidavit, has been made in the cause by the Lord Chancellor or Vice-Chancellor, and no such order has been made by the Master of the Rolls.

3. Where the cause has not been set down for hearing, and orders disposing of pleas or demurrers, or special orders upon merits shewn by answer or affidavit, have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but the last of such orders was made by the Lord Chancellor or Vice-Chancellor.

4. Where the cause has been set down for hearing before the Lord Chancellor, either for original hearing or for further directions, or on the equity reserved.

5. Where the decree or last decretal order was made by the Lord Chancellor or Vice-Chancellor, except in cases where the decree or last decretal order was made by the Lord Chancellor on a re-hearing of a decree or decretal order made by the Master of the Rolls.

X. THAT, from and after the said 20th day of May instant, the several causes and matters hereinafter mentioned, not already set down, shall be set down to be heard before the Master of the Rolls, and shall not, otherwise than for the purpose of re-hearing, be set down to be heard before the Lord Chancellor.

1. Every plea or demurrer, and all exceptions in any cause in which the information or bill shall be marked with the words "Master of the Rolls;" or in which the entries of the cause in the Six Clerks' books shall be so marked as to signify that the same is to be heard before the Master of the Rolls.

2. Every cause in which the certificate of the same being ready for hearing shall be marked with the words "Master of the Rolls."

3. Every cause requiring to be heard for further directions or on the equity reserved, and in which the Master's report has been or shall be made, or a trial at law has been or shall be had, or the certificate of a Court of Common Law has been or shall be obtained, in pursuance of a decree or order pronounced by the Master of the Rolls.

4. Every exception, or set of exceptions, taken to any report made by a Master in ordinary, pursuant to a de-

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cree or an order of reference (not being an order obtained as of course) made by the Master of the Rolls.

XI. THAT, from and after the said 20th day of May instant, every petition presented, or motion made, under or pursuant to the liberty to apply contained in any decree or decretal order of the Master of the Rolls, shall be addressed to and set down to be heard, or shall be made, before the Master of the Rolls: and that, except for the purpose of re-hearing an order of the Master of the Rolls, no such petition or motion shall be addressed to or made before the Lord Chancellor.

XII. THAT, from and after the said 20th day of May instant, all interlocutory applications, by way of motion or petition (other than applications for orders of course), shall, in the several cases hereinafter mentioned, be made to the Master of the Rolls, and shall not, except for the purpose of re-hearing an order of the Master of the Rolls, be made to the Lord Chancellor; viz. in the several cases following:—

1. Where the original information or bill is marked with the words “Master of the Rolls.”

2. Where the cause has not been set down for hearing, and any order disposing of any plea or demurrer, or any special order upon merits shewn by answer or affidavit, has been made in the cause by the Master of the Rolls, and no such order has been made by the Lord Chancellor or Vice-Chancellor.

3. Where the cause has not been set down for hearing, and orders disposing of pleas or demurrers, or special order upon merits shewn by answer or affidavit, have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but the last of such orders has been made by the Master of the Rolls.

4. Where the cause has been set down for hearing before the Master of the Rolls, either for original hearing or for further directions, or on the equity reserved, and is not now set down to be so heard before the Lord Chancellor.

5. Where the decree or last decretal order was made by the Master of the Rolls or by the Lord Chancellor, on the re-hearing of a decree or decretal order of the Master of the Rolls.

XIII. THAT the above Orders as to interlocutory applications shall not extend to any applications for orders of course, nor to any petitions presented, or notices of motion given, before the 18th day of May instant.

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XIV. THAT all applications for orders of course to be obtained on petition or motion shall and may be made in the same manner in all respects as if the above Orders had not been made; but as to all cases in which, according to the 9th preceding Order, interlocutory applications (other than applications for orders of course) are directed to be made before the Lord Chancellor or Vice-Chancellor, if any order nisi, upon which cause against making the order absolute is to be shewn to the Court, shall be obtained as of course from the Master of the Rolls, such cause shall be shewn before the Lord Chancellor or Vice-Chancellor; and if any order of reference to the Master in ordinary shall be obtained as of course from the Master of the Rolls, and the Master's report pursuant to such order of reference shall be excepted to, the exceptions thereto shall be heard before the Lord Chancellor or the Vice-Chancellor: and in all cases in which, according to the 12th preceding Order, interlocutory applications (other than applications for orders of course) are directed to be made before the Master of the Rolls, if any order nisi, upon which cause against making the order absolute is to be shewn to the Court, shall be obtained as of course from the Lord Chancellor or Vice-Chancellor, such cause shall be shewn before the Master of the Rolls; and if any order of reference to the Master in ordinary shall be obtained as of course from the Lord Chancellor or Vice-Chancellor, and the Master's report pursuant to such order of reference shall be excepted to, the exceptions thereto shall be heard before the Master of the Rolls.

XV. THAT, in the interval between the close of the sittings after any term and the commencement of the sittings before or at the beginning of the next ensuing term, applications for special orders may be made to any Judge of the Court in the same manner as if these Orders had not been made; but that the orders which shall be made in any such interval by the Lord Chancellor, or by the Master of the Rolls, or by the Vice-

SETTLEMENT.

On a treaty of marriage, carried on in *London*, between the only son of an *English* Marquess and the daughter of a *Scotch* Earl, the terms of a marriage settlement were embodied in a paper, called "Proposals;" which paper was approved by the respective fathers, on behalf of their children. The Proposals stipulated that the Earl should pay or advance, as the portion of his daughter, certain sums of money, at the times and in the manner therein specified; and that in consideration of those sums and of the marriage, the Marquess and his son should concur in charging large estates in *England*, *Ireland*, and the *West Indies*, with certain provisions for the husband, during his father's life, and for the wife and the younger children of the marriage; and subject thereto, should settle the same estates upon the Marquess and his son, successively, for life, with remainders to the issue of the marriage, according to the series of limitations therein specified. The Proposals concluded with a proviso, that the settlement should contain the usual powers of appointing new trustees, the usual clause of indemnity to trustees, and all other usual and necessary clauses. A settlement was then prepared and executed in *London*, to which the intended husband and wife, with

their respective fathers, and certain other persons, as trustees, were parties, and of which the provisions, though different in several particulars, were similar in their general character to the terms contained in the Proposals; and the marriage took effect. Many years afterwards, the Earl, who was a domiciled *Scotchman*, died, leaving a large personal estate; and a suit having been thereupon instituted in *Scotland*, in which all persons, who were competent to contest the question, intervened, it was adjudged by the Court of Session, and also, on appeal, by the House of Lords, that, according to the law of *Scotland*, the daughter of the deceased Earl was entitled to a proportionate share of her father's personal estate, called, in that law, her legitim, inasmuch as she had not renounced that right by her marriage settlement, or otherwise. Very shortly before this decision of the Court of Session, the Proposals, which had been mislaid, were discovered; and the present bill was then filed against the husband and wife, alleging that the settlement had been prepared in pursuance, and on the basis, of the Proposals; that in *Scotland*, a clause barring legitim was a usual and necessary clause, in the marriage settlement of a child, for whom the father thereby advanced a portion; that the proviso in the Proposals was understood by all the contracting parties as applying to and comprising

prising such a clause; that as no such clause was to be found in the settlement, as executed, the settlement did not effectuate the intention of the contract, as expressed in the Proposals; and that it was in this respect erroneous, and ought to be reformed. The bill prayed a declaration accordingly, and that in the meantime the Defendants might be restrained by injunction from proceeding to enforce the decree obtained in the *Scotch* Court for payment of the sum found due to the Defendants on account of the legitim. The Lord Chancellor dissolved the injunction, which had been granted by the Vice-Chancellor, and held,

First, that the proviso was to be construed with reference to the subject-matter and objects of the settlement, which was in the *English* form, and applied exclusively to *English* subject-matter; and that a clause barring legitim, therefore, could not be considered as comprehended under it:

Secondly, that whereas the claim to legitim could only be barred by an express contract, between the father and the daughter, to that effect, the father, in approving of the Proposals, was acting on behalf of his daughter, and not as a party dealing adversely with her, for the purchase or renunciation of her rights.

Thirdly, that there was no sufficient evidence to shew that the Proposals constituted the final

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contract of the parties, and had not been varied by some subsequent agreement, prior to the execution of the settlement.

The Court will not reform a settlement, on the ground of mistake, unless the evidence, as to the mistake, and as to the real intention of the parties, is perfectly clear and satisfactory.

Whether the Court would entertain such a suit, on the ground of the discovery of matter constituting a new case, after the subject of the suit had been adjudicated upon and disposed of by a foreign tribunal of competent jurisdiction, when it did not appear that the new matter might not still be made available before the foreign tribunal, according to the course of proceeding there, *quære*. *The Marquess of Breadalbane v. The Marquess of Chandos*.

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SHIP.

See CONSTRUCTION OF STATUTES.

SHIP REGISTRY ACT.

The Court will entertain a suit for an account of the freight of a ship, grounded on a contract which also contains stipulations affecting to give an ultimate right of property in the ship, and which may not be capable of being recognised or enforced as a whole, for want of being registered; provided the title to the freight is distinct from and does not neces-

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sarily depend upon a title to the ship claimed under such contract.
Davenport v. Whitmore. Page 177

SOLICITOR.

See COSTS, 2, 3.

STATUTES.

1. 3 & 4 W. 4. c. 74. *In the Matter of Newman.* 112
2. 3 & 4 W. 4. c. 27. *Phillipo v. Munnings.* 309
3. 3 & 4 W. 4. c. 94. s. 13. *Carr v. Appleyard.* 476
4. 53 G. 3. c. 159. *Dobree v. Schroder.* 409
5. 6 W. 4. c. 76. *Attorney-General v. Mayor of Norwich.* 406
Attorney-General v. Aspinall. 613
6. 1 W. 4. c. 60. *In the Matter of Prideaux.* 640

SURETY.

See CONSTRUCTION, 3.

TAXATION.

See COSTS, 2, 3.

THEATRE.

See PARTNERSHIP.

TRUST.

See BREACH OF TRUST.
 LIMITATION ACT.
 WILL, 2.

TRUSTEES.

See BREACH OF TRUST.
 CHARITY, 2.
 DEMURRER, 2.
 INFANTS.

VENDOR AND PURCHASER.

By conditions of sale it was stipulated that the vendor of an estate which was sold in lots should deliver an abstract of the title to the purchasers, and deduce a good title, but that as to a part of the estate, acquired under an inclosure, he should not be bound to shew any title thereto prior to the award; and it was farther stipulated that the vendor should deliver up to the largest purchaser in value all the title deeds and other documents in his custody, but should not be required to produce any original deed or other documents than those in his possession and set forth in the abstract: Held, on the construction of these conditions, that they did not relieve the vendor from his liability to verify the title shewn upon the abstract by producing the title deeds themselves, or, if any of them were not in his possession, by other satisfactory evidence.

If a vendor intends to deprive a purchaser of the right to the production of any evidences necessary to verify the title beyond what the

the title deeds in his own custody will supply, he is bound to make that intention previously known to the purchaser in clear and explicit terms. *Southby v. Hutt.*

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VERIFICATION OF ABSTRACT.

See VENDOR AND PURCHASER.

VISITOR.

See CHARITY, 1.
COLLEGE.

WARD OF COURT.

The Court will not make an order, permitting the removal of its infant wards out of the jurisdiction, for the purpose of residing permanently abroad, except in a case of imperative necessity; as, where it is clearly proved that a constant residence in a warmer climate is absolutely essential to their health.

Such an order, if made, ought to comprise a scheme for the education of the infants, as well as a provision for informing the Court from time to time of their progress and condition, and an undertaking to bring them within the jurisdiction when required. *Campbell v. Mackay.*

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WILL.

1. A testator by his will gave 3000*l.* to his brother *B.* for life, with re-

mainder, as to 1000*l.*, to his wife for life; remainder, as to the whole, to his children; he then gave 6000*l.* to his sister *S.* for life, with remainder to her husband for life, remainder to her children; and, after bequeathing 10*l.* a year to each of his two maid servants for their lives, he gave all his real estate, and the residue of his personal estate, to his sister *H.* absolutely. By a testamentary paper, described as a codicil to his will, he left his brother *B.* an equal share of his effects with his sisters, to have the interest for his life, with remainder to his children, subject to a life interest in 1000*l.* to his wife, if living at his death; and his sister *S.* was to have an equal share with his sister *H.* By a subsequent testamentary paper, also described as a codicil, he left his two maid servants 10*l.* a year each for their lives, and nominated a person to act as trustee with the executors named in the will:

Held, upon the effect of all the testamentary papers taken together, that the will, though modified, was not wholly revoked by the first codicil; and that, in lieu of the 6000*l.* legacy given them by the will, *S.* and her children were entitled to one third share of the personal estate, in the same manner and subject to the same limitations as had been expressed by the will with respect to that legacy. *Cookson v. Hancock.*

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2. A testatrix by her will bequeathed all her personal estate to C., whom she appointed one of her executors, for his own use and benefit for ever, trusting and wholly confiding in his honour, that he would act in strict conformity with her wishes. Afterwards, on the same day, she executed a testamentary paper, which contained a list of a number of persons by name, and, among others, the name of the person who was her sole next of kin, with the several sums to be given to them respectively, and concluded with a declaration that such was the testatrix's wish:

Held, upon appeal, that C. took the personal estate for his own use absolutely, subject only to the payment of the legacies specified in the testamentary paper, and of three other sums, which C. by his answer admitted that the testatrix had directed him, and which he submitted to pay. *Wood v. Cox.* Page 684

3. A testator, after bequeathing a number of pecuniary legacies to different persons, and giving a certain field to his godson, directed that all his debts and the above legacies, should be paid and discharged within six months after his decease; and all the rest and residue of his estate, both real and personal, he gave to N. The personal estate proving insufficient to pay the debts and legacies, it was held, upon demurrer to a bill by some of the legatees seeking to charge their legacies on the real estate which passed under the residuary devise to N.,

First, that there was no equity in favour of pecuniary legatees, to have the assets marshalled, so as to throw the debts upon the real estate devised to N.; but,

Secondly, that both the debts and legacies were, by the words of the will, effectually charged upon that estate. *Mirehouse v. Scaife.* Page 695

END OF THE SECOND VOLUME.

LONDON:

Printed by A. SPOTTISWOODS,
New-Street-Square.

APPENDIX.

*ORDERS for better regulating the Hearing of Causes
and other Matters in the Court of Chancery.*

COURT OF CHANCERY.

5th May, 1837.

The Right Honourable CHARLES CHRISTOPHER Lord COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY Lord LANGDALE, Master of the Rolls, and the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, doth hereby order and direct in manner following; that is to say,—

I. THAT, from and after the 20th day of May now instant, every original information or bill of complaint filed in the High Court of Chancery, shall (at the option of the party, informant or complainant, by or on whose behalf the information or bill shall be filed) be distinctly marked at or near the top or upper part thereof, either with the words “Lord Chancellor,” or with the words “Master of the Rolls:” And that the Six Clerk and Clerk in Court, to whom the filing of the information or bill belongs, shall, in the books and indexes in which the same shall be entered, add to the entry thereof such distinguishing words or mark as may make it appear from such entry whether the information or bill is marked with the words “Lord Chancellor,” or with the words “Master of the Rolls:” and that, from and after the said 20th day of May, the Six Clerks and Clerks in Court are not to file any original information or bill of complaint which shall not be marked in the manner hereinbefore directed.

II. THAT, in every cause in which the original information or bill shall be marked with the words “Lord Chancellor,” or with the words “Master of the Rolls,” the Six Clerk to whom it belongs to give or sign the certificate that the cause is ready for hearing shall, upon

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being applied to for such certificate, see that the same certificate is marked, or cause the same to be marked, with the words "Lord Chancellor," or with the words "Master of the Rolls," in conformity with the like words marked on the original information or bill.

III. THAT, in every cause now in Court, but which has not yet been set down for hearing, the Clerk in Court who, on the behalf of the informant, or of the plaintiff or defendant, shall, at any time after the 20th day of May instant, apply to the Six Clerk to set down the cause for hearing, or for the certificate that the cause is ready for hearing, shall state or certify to such Six Clerk whether any orders or order disposing of any pleas or plea, demurrers or demurrer, or any special orders or order upon merits shewn by answer or by affidavit, have or has been made in the cause, or (in case no such order as aforesaid has been made) whether the party on whose behalf the application is made desires the cause to be heard before the Lord Chancellor or the Master of the Rolls; and in case the Clerk in Court so applying shall certify that any such order as aforesaid has been made by the Lord Chancellor or Vice-Chancellor, and not by the Master of the Rolls, or that such orders as aforesaid have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but that the last of such orders has been made by the Lord Chancellor or Vice-Chancellor, or (in case no such order has been made in the cause) that the party desires the cause to be heard before the Lord Chancellor, the Six Clerk giving the certificate shall see that the same certificate is marked, or shall cause the same to be marked, with the words "Lord Chancellor;" and the Six Clerk and Clerk in Court shall cause the entries of the cause in their books and indexes to be marked with such distinguishing words or marks as shall signify that the cause is to be heard before the Lord Chancellor; and in case the Clerk in Court so applying as aforesaid shall certify that any such order as aforesaid has been made by the Master of the Rolls, and not by the Lord Chancellor or Vice-Chancellor, or that such orders as aforesaid have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but that the last of such orders has been made by the Master of the Rolls, or (in case no such order as aforesaid has been made in the cause) that the party

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desires the cause to be heard before the Master of the Rolls, the Six Clerk giving the certificate shall see that the same certificate is marked, or shall cause the same to be marked, with the words "Master of the Rolls;" and the Six Clerk and Clerk in Court shall cause the entries of the cause in their books and indexes to be marked with such distinguishing words or marks as shall signify that the cause is to be heard before the Master of the Rolls.

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IV. THAT the Registrars of the Court, and the Secretaries of the Lord Chancellor and of the Master of the Rolls, are not at any time after the said 20th day of May instant, to set down to be heard any cause in which the certificate of the cause being ready for hearing shall not be marked in the manner directed by the 2d and 3rd Orders, and are not, after the date of these Orders, to set down to be heard before the Master of the Rolls any cause, further directions, or exceptions, which is or are now set down to be heard before the Lord Chancellor, and are not, without special order of the Lord Chancellor, to set down to be heard before the Lord Chancellor any cause, further directions, or exceptions, which is or are now set down to be heard before the Master of the Rolls.

V. THAT in every petition praying that a day may be appointed for arguing a plea or demurrer put in to any information or bill filed on or after the said 20th day of May, it shall be stated whether the information or bill to which such plea or demurrer is put in is marked with the words "Lord Chancellor," or with the words "Master of the Rolls."

VI. THAT, from and after the said 20th day of May instant, the several causes and matters hereinafter mentioned, not already set down, shall be set down to be heard before the Lord Chancellor, and shall not without special order of the Lord Chancellor be set down to be heard before the Master of the Rolls.

1. Every plea or demurrer, and all exceptions in any cause in which the information or bill shall be marked with the words "Lord Chancellor," or in which the entries of the cause in the Six Clerks' books shall be so marked as to signify that the same is to be heard before the Lord Chancellor.

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2. Every cause in which the certificate of the cause being ready for hearing shall be marked with the words "Lord Chancellor."

3. Every cause requiring to be heard for further directions, or on the equity reserved, and in which the Master's report has been or shall be made, or a trial at law has been or shall be had, or the certificate of a court of common law has been or shall be obtained in pursuance of a decree or order pronounced by the Lord Chancellor or Vice-Chancellor.

4. Every exception or set of exceptions taken to any report made by a Master in ordinary, in pursuance of a decree, or an order of reference (not being an order obtained as of course), made by the Lord Chancellor or the Vice-Chancellor.

VII. THAT, from and after the said 20th day of May instant, every petition presented or motion made under or pursuant to the liberty to apply contained in any decree or decretal order of the Lord Chancellor or Vice-Chancellor, shall, as to petitions, be addressed to and set down to be heard before the Lord Chancellor, and shall, as to motions, be made before the Lord Chancellor or Vice-Chancellor; and that no such petition or motion shall, without special order of the Lord Chancellor, be addressed to or made before the Master of the Rolls.

VIII. THAT all such pleas, demurrers, causes, further directions, exceptions, and petitions, to be so set down to be heard before the Lord Chancellor, as hereinbefore is directed, shall be heard and determined in the same manner, and be subject to the same rules, as pleas, demurrers, causes, further directions, exceptions, and petitions set down before the Lord Chancellor, have heretofore been heard and determined.

IX. THAT, from and after the said 20th day of May instant, all interlocutory applications by way of motion or petition (other than applications for orders of course), shall, in the several cases hereinafter mentioned, be made to the Lord Chancellor or to the Vice-Chancellor, and shall not, without special order of the Lord Chancellor, be made to the Master of the Rolls; viz. in the several cases following:—

1. Where the original information or bill is marked with the words "Lord Chancellor."

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2. Where the cause has not been set down for hearing, and any order disposing of any plea or demurrer or any special order upon merits, shewn by answer or by affidavit, has been made in the cause by the Lord Chancellor or Vice-Chancellor, and no such order has been made by the Master of the Rolls.

3. Where the cause has not been set down for hearing, and orders disposing of pleas or demurrers, or special orders upon merits shewn by answer or affidavit, have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but the last of such orders was made by the Lord Chancellor or Vice-Chancellor.

4. Where the cause has been set down for hearing before the Lord Chancellor, either for original hearing or for further directions, or on the equity reserved.

5. Where the decree or last decretal order was made by the Lord Chancellor or Vice-Chancellor, except in cases where the decree or last decretal order was made by the Lord Chancellor on a re-hearing of a decree or decretal order made by the Master of the Rolls.

X. THAT, from and after the said 20th day of May instant, the several causes and matters hereinafter mentioned, not already set down, shall be set down to be heard before the Master of the Rolls, and shall not, otherwise than for the purpose of re-hearing, be set down to be heard before the Lord Chancellor.

1. Every plea or demurrer, and all exceptions in any cause in which the information or bill shall be marked with the words "Master of the Rolls;" or in which the entries of the cause in the Six Clerks' books shall be so marked as to signify that the same is to be heard before the Master of the Rolls.

2. Every cause in which the certificate of the same being ready for hearing shall be marked with the words "Master of the Rolls."

3. Every cause requiring to be heard for further directions or on the equity reserved, and in which the Master's report has been or shall be made, or a trial at law has been or shall be had, or the certificate of a Court of Common Law has been or shall be obtained, in pursuance of a decree or order pronounced by the Master of the Rolls.

4. Every exception, or set of exceptions, taken to any report made by a Master in ordinary, pursuant to a de-

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cree or an order of reference (not being an order obtained as of course) made by the Master of the Rolls.

XI. THAT, from and after the said 20th day of May instant, every petition presented, or motion made, under or pursuant to the liberty to apply contained in any decree or decretal order of the Master of the Rolls, shall be addressed to and set down to be heard, or shall be made, before the Master of the Rolls: and that, except for the purpose of re-hearing an order of the Master of the Rolls, no such petition or motion shall be addressed to or made before the Lord Chancellor.

XII. THAT, from and after the said 20th day of May instant, all interlocutory applications, by way of motion or petition (other than applications for orders of course), shall, in the several cases hereinafter mentioned, be made to the Master of the Rolls, and shall not, except for the purpose of re-hearing an order of the Master of the Rolls, be made to the Lord Chancellor; viz. in the several cases following:—

1. Where the original information or bill is marked with the words "Master of the Rolls."
2. Where the cause has not been set down for hearing, and any order disposing of any plea or demurrer, or any special order upon merits shewn by answer or affidavit, has been made in the cause by the Master of the Rolls, and no such order has been made by the Lord Chancellor or Vice-Chancellor.
3. Where the cause has not been set down for hearing, and orders disposing of pleas or demurrers, or special order upon merits shewn by answer or affidavit, have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but the last of such orders has been made by the Master of the Rolls.
4. Where the cause has been set down for hearing before the Master of the Rolls, either for original hearing or for further directions, or on the equity reserved, and is not now set down to be so heard before the Lord Chancellor.
5. Where the decree or last decretal order was made by the Master of the Rolls or by the Lord Chancellor, on the re-hearing of a decree or decretal order of the Master of the Rolls.

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XIII. THAT the above Orders as to interlocutory applications shall not extend to any applications for orders of course, nor to any petitions presented, or notices of motion given, before the 18th day of May instant.

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XIV. THAT all applications for orders of course to be obtained on petition or motion shall and may be made in the same manner in all respects as if the above Orders had not been made; but as to all cases in which, according to the 9th preceding Order, interlocutory applications (other than applications for orders of course) are directed to be made before the Lord Chancellor or Vice-Chancellor, if any order nisi, upon which cause against making the order absolute is to be shewn to the Court, shall be obtained as of course from the Master of the Rolls, such cause shall be shewn before the Lord Chancellor or Vice-Chancellor; and if any order of reference to the Master in ordinary shall be obtained as of course from the Master of the Rolls, and the Master's report pursuant to such order of reference shall be excepted to, the exceptions thereto shall be heard before the Lord Chancellor or the Vice-Chancellor: and in all cases in which, according to the 12th preceding Order, interlocutory applications (other than applications for orders of course) are directed to be made before the Master of the Rolls, if any order nisi, upon which cause against making the order absolute is to be shewn to the Court, shall be obtained as of course from the Lord Chancellor or Vice-Chancellor, such cause shall be shewn before the Master of the Rolls; and if any order of reference to the Master in ordinary shall be obtained as of course from the Lord Chancellor or Vice-Chancellor, and the Master's report pursuant to such order of reference shall be excepted to, the exceptions thereto shall be heard before the Master of the Rolls.

XV. THAT, in the interval between the close of the sittings after any term and the commencement of the sittings before or at the beginning of the next ensuing term, applications for special orders may be made to any Judge of the Court in the same manner as if these Orders had not been made; but that the orders which shall be made in any such interval by the Lord Chancellor, or by the Master of the Rolls, or by the Vice-

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Chancellor, shall, if not made by the Judge to whom the application, if made during the ordinary sittings of the Court, would have been made pursuant to the directions contained in these Orders, be marked as having been made for such Judge, and shall in the future proceedings of the cause be deemed to be the order of such Judge in all respects save this, — that no order so made by one Judge for another under the circumstances aforesaid shall be re-heard for the purpose of being discharged or varied otherwise than by the Lord Chancellor.

XVI. THAT, from and after the said 20th day of May instant, all matters which, under and by virtue of any Act of Parliament or otherwise, the Court hath jurisdiction to hear and determine in a summary way, and which shall be in the first instance brought under the consideration of the Court upon a petition presented to the Lord Chancellor, shall in any subsequent stage of the proceedings respecting the same matters be heard and determined by the Lord Chancellor or Vice-Chancellor; and that no petition respecting the same matters in any subsequent stage of the proceedings relating thereto, shall, without special order of the Lord Chancellor, be set down to be heard before the Master of the Rolls; and that all such matters as aforesaid which shall be in the first instance brought under the consideration of the Court upon a petition to the Master of the Rolls, shall, in any subsequent stage of the proceedings respecting the same matters, be heard and determined by the Master of the Rolls; and that no petition respecting the same matters in any subsequent stage of the proceedings relating thereto, shall, otherwise than for the purpose of re-hearing an order of the Master of the Rolls, be set down to be heard before the Lord Chancellor.

COTTENHAM, C.
LANGDALE, M. R.
LANCELOT SHADWELL, V. C.



the appropriation rescinded, as being a breach of trust, is not ousted by the special remedies provided in certain cases by the 97th section of the Municipal Corporation Act.

Semble, Those remedies would not be applicable in any case to a transaction of this description. *Attorney-General v. Aspinall*.

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See DEMURRER, 2.

NEW ORDERS.

See AMENDMENT.
PRACTICE, 2.

NEW TRIAL.

In cases, in which, but for the existence of a trust, the title to real property would be to be tried at law, and a party would consequently have repeated opportunities of trying it, the Court of Chancery is unwilling to bind the rights of the parties by a single trial, especially when it appears likely that more light will be thrown upon the subject by another trial.

A second trial of an issue with respect to a copyhold custom, was directed in a case, in which the result of the first trial would have gone far to establish within an extensive district, a rule of inheritance of which no distinct precedent had been proved in evidence. *Locke v. Colman*. 42

NEXT FRIEND.

See INFANTS.

NUISANCE.

See INJUNCTION.

OCCUPATION RENT.

The Court will not, by an interlocutory order before the hearing, charge a party who is in possession of an estate, and who has been ordered to pay an occupation rent to the receiver, with the amount of such rent for any period antecedent to the date of the order for fixing the rent and appointing the receiver. *Lloyd v. Mason*.

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PARTIES.

Although the husband of an administratrix may have become liable to make good to the next of kin of the intestate the assets received by himself or his wife during the coverture, yet if the husband, at his death, makes his wife his executrix, and she possesses assets more than sufficient to answer the demands of the next of kin, after paying the other debts, the estate of the husband is discharged; and therefore the next of kin cannot sue an administrator *cum testamento annexo* of the husband.

To a bill which seeks an account of the assets of an intestate who died

died in *India*, possessed by a personal representative there, a personal representative of the intestate constituted in *England*, is a necessary party, although it does not appear that the intestate at the time of her death had any assets in *England*. And it is not sufficient, in order to avoid a demurrer for want of parties in such a case, that the personal representative constituted in *India*, who is out of the jurisdiction, is made a party, and that process is prayed against her when within the jurisdiction, although the bill alleges that the *Indian* Court was the proper Court for granting administration, and that the administratrix constituted by it is the sole legal personal representative of the intestate.

Although it is much of course to give leave to amend when a demurrer for want of parties is allowed; yet if the Court sees that the frame of the bill, as it then stands, is not such as entitles the Plaintiff to relief as against the demurring party, leave to amend will be refused. *Tyler v. Bell*. Page 89

See DEMURRER, 1.

PARTNERSHIP.

No play can lawfully be acted for hire, gain, or reward, within twenty miles of *London*, without the authority of letters patent from the King, or of a licence from the Lord Chamberlain; and no such

letters patent or licence can be granted so as to authorise the performance of plays at any place, except within the city or liberties of *Westminster*, or where the King may happen to reside.

An agreement, therefore, for a partnership in acting plays at a theatre situate within twenty miles of *London*, but not within the city or liberties of *Westminster*, or in the place of the King's residence, is one to which the Court will not give effect. *Ewing v. Osbaldiston*.

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PAYMENT INTO COURT.

See INTERPLEADER, 2.

PLEA.

A plea of proceedings in another Court of competent jurisdiction, must shew not only that the same issue was joined as in the suit in this Court, but that the subject-matter was the same, and that the proceedings in the other Court were taken for the same purpose. *Behrens v. Sieveking*. 602

PLEADING.

See AMENDMENT.

DEMURRER, 1, 2.

INFANTS.

PARTIES.

PLEA.

POWER.

A real estate was settled to the use of a father for life, with remainder to

to the use of all and every or such one or more of his children, for such estate and estates, and in such parts, shares, and proportions, and with such limitations over, and charged with such annual or gross sums, such limitations over and charges to be to or for the benefit of the same children, some or one of them, and in such manner and form as the father should appoint. The father afterwards appointed the estate to trustees and their heirs, upon trust to pay the rents and profits thereof to his daughter, who was a married woman, for her sole and separate use during the life of her husband, without power of anticipation: Held, that the appointment of the estate to trustees for the separate use of the daughter during the joint lives of herself and her husband was a valid exercise of the power. *Thornton v. Bright.* Page 230

PRACTICE.

1. A party against whom an attachment has issued for want of an answer, cannot file an answer and demurrer to the bill, even although no further step in the process has been taken; and it makes no difference in this respect, that the demurrer is only to a part of the discovery sought, and not to the relief. *Vigers v. Lord Audley.* 49
2. When an order has been made at the hearing, directing that the

cause shall stand over, but giving the Plaintiff leave to amend by adding parties, if the Plaintiff, after having added some parties, is desirous to add others, he must apply for further leave so to do: and that application must be made to the Court, and not to a Master.

Biedermann v. Seymour. Page 117

3. Discussion of the principles upon which a specialty creditor whose debt is also secured by a mortgage or lien should prove his debt under a decree in a creditor's suit. 'Sir J. Leach's decision in *Greenwood v. Taylor* (1 Russ. & Mylne, 185.) questioned. *Mason v. Bogg.* 443
4. The Court has a right to advance, at its discretion, any cause which is ripe for hearing. *Semble*, the Lord Chancellor has no jurisdiction to discharge or vary an order made for that purpose by the Master of the Rolls. *Hutchinson v. Stephens.* 452
5. A motion for leave to examine witnesses, and that publication may be in the meantime enlarged, after publication has actually passed, is not an application which comes within the meaning of the 3 & 4 W. 4. c. 94. s. 13., but ought to be made to the Court in the first instance. *Carr v. Appleyard.* 476
6. A party against whom an attachment has issued for disobedience to an order, may, notwithstanding the attachment, move to discharge the order. *Brown v. Newall.* 558

7. Ser-

7. Service of a notice of motion upon a Defendant, before he has appeared to the bill, is irregular, unless the leave of Court has been previously obtained. *Hill v. Rimell.* Page 641

8. A cause may be set down for hearing in the cause book of the same term in which publication has passed, provided it be not set down until after the last day of the term. *Turner v. Hitchon.*

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See AMENDMENT.

COSTS, 2, 3.

INTERPLEADER, 2.

OCCUPATION RENT.

PRIVILEGE.

See CONTEMPT.

PROTECTOR.

See LUNATIC, 3.

RECEIVER.

Receiver granted, at the instance of an executor, pending a suit in the ecclesiastical court, to have the probate annulled; the Defendant, who was the party impeaching the will and setting up an intestacy, having by her own acts prevented the executor from getting in the assets. *Marr v. Littlewood.* 454

REFUNDING.

The circumstance that an intestate's personal estate has been dis-

tributed, in a suit, among the persons appearing to be his sole next of kin, does not necessarily preclude other persons having an equal title to that character, from afterwards instituting a new suit against the next of kin who have been thus overpaid, and compelling them to refund a proportion of their shares. *Sawyer v. Birchmore.* Page 611

RESIDENCE.

See CHARITY, 1.

RESIDUARY DEVISE.

See WILL, 3.

REVOCATION.

By a written contract for the purchase of an estate, it was stipulated that the conveyance should be made to the purchaser, his heirs, appointees, or assigns. The purchaser immediately afterwards made a devise of the estate, and subsequently took a conveyance of it to himself and his heirs, to the usual uses to bar dower: Held, that the devisee could not make such a title as a purchaser would be bound to accept, inasmuch as all the existing authorities shew that the devise was revoked by the subsequent conveyance. *Bullin v. Fletcher.* 432

See WILL, 1.

SERVICE.

See PRACTICE, 7.

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SETTLEMENT.

On a treaty of marriage, carried on in *London*, between the only son of an *English* Marquess and the daughter of a *Scotch* Earl, the terms of a marriage settlement were embodied in a paper, called "Proposals;" which paper was approved by the respective fathers, on behalf of their children. The Proposals stipulated that the Earl should pay or advance, as the portion of his daughter, certain sums of money, at the times and in the manner therein specified; and that in consideration of those sums and of the marriage, the Marquess and his son should concur in charging large estates in *England*, *Ireland*, and the *West Indies*, with certain provisions for the husband, during his father's life, and for the wife and the younger children of the marriage; and subject thereto, should settle the same estates upon the Marquess and his son, successively, for life, with remainders to the issue of the marriage, according to the series of limitations therein specified. The Proposals concluded with a proviso, that the settlement should contain the usual powers of appointing new trustees, the usual clause of indemnity to trustees, and all other usual and necessary clauses. A settlement was then prepared and executed in *London*, to which the intended husband and wife, with

their respective fathers, and certain other persons, as trustees, were parties, and of which the provisions, though different in several particulars, were similar in their general character to the terms contained in the Proposals; and the marriage took effect. Many years afterwards, the Earl, who was a domiciled *Scotchman*, died, leaving a large personal estate; and a suit having been thereupon instituted in *Scotland*, in which all persons, who were competent to contest the question, intervened, it was adjudged by the Court of Session, and also, on appeal, by the House of Lords, that, according to the law of *Scotland*, the daughter of the deceased Earl was entitled to a proportionate share of her father's personal estate, called, in that law, her legitim, inasmuch as she had not renounced that right by her marriage settlement, or otherwise. Very shortly before this decision of the Court of Session, the Proposals, which had been mislaid, were discovered; and the present bill was then filed against the husband and wife, alleging that the settlement had been prepared in pursuance, and on the basis, of the Proposals; that in *Scotland*, a clause barring legitim was a usual and necessary clause, in the marriage settlement of a child, for whom the father thereby advanced a portion; that the proviso in the Proposals was understood by all the contracting parties as applying to and comprising

prising such a clause; that as no such clause was to be found in the settlement, as executed, the settlement did not effectuate the intention of the contract, as expressed in the Proposals; and that it was in this respect erroneous, and ought to be reformed. The bill prayed a declaration accordingly, and that in the meantime the Defendants might be restrained by injunction from proceeding to enforce the decree obtained in the *Scotch* Court for payment of the sum found due to the Defendants on account of the legitim. The Lord Chancellor dissolved the injunction, which had been granted by the Vice-Chancellor, and held,

First, that the proviso was to be construed with reference to the subject-matter and objects of the settlement, which was in the *English* form, and applied exclusively to *English* subject-matter; and that a clause barring legitim, therefore, could not be considered as comprehended under it:

Secondly, that whereas the claim to legitim could only be barred by an express contract, between the father and the daughter, to that effect, the father, in approving of the Proposals, was acting on behalf of his daughter, and not as a party dealing adversely with her, for the purchase or renunciation of her rights.

Thirdly, that there was no sufficient evidence to shew that the Proposals constituted the final

contract of the parties, and had not been varied by some subsequent agreement, prior to the execution of the settlement.

The Court will not reform a settlement, on the ground of mistake, unless the evidence, as to the mistake, and as to the real intention of the parties, is perfectly clear and satisfactory.

Whether the Court would entertain such a suit, on the ground of the discovery of matter constituting a new case, after the subject of the suit had been adjudicated upon and disposed of by a foreign tribunal of competent jurisdiction, when it did not appear that the new matter might not still be made available before the foreign tribunal, according to the course of proceeding there, *quære*. *The Marquess of Breadalbane v. The Marquess of Chandos*.

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SHIP.

See CONSTRUCTION OF STATUTES.

SHIP REGISTRY ACT.

The Court will entertain a suit for an account of the freight of a ship, grounded on a contract which also contains stipulations affecting to give an ultimate right of property in the ship, and which may not be capable of being recognised or enforced as a whole, for want of being registered; provided the title to the freight is distinct from and does not neces-

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sarily depend upon a title to the ship claimed under such contract.
Davenport v. Whitmore. Page 177

SOLICITOR.

See COSTS, 2, 3.

STATUTES.

1. 3 & 4 W. 4. c. 74. *In the Matter of Newman.* 112
2. 3 & 4 W. 4. c. 27. *Phillipo v. Munnings.* 309
3. 3 & 4 W. 4. c. 94. s. 13. *Carr v. Appleyard.* 476
4. 53 G. 3. c. 159. *Dobree v. Schroder.* 409
5. 6 W. 4. c. 76. *Attorney-General v. Mayor of Norwich.* 406
Attorney-General v. Aspinall. 613
6. 1 W. 4. c. 60. *In the Matter of Prideaux.* 640

SURETY.

See CONSTRUCTION, 3.

TAXATION.

See COSTS, 2, 3.

THEATRE.

See PARTNERSHIP.

TRUST.

See BREACH OF TRUST.
 LIMITATION ACT.
 WILL, 2.

TRUSTEES.

See BREACH OF TRUST.
 CHARITY, 2.
 DEMURRER, 2.
 INFANTS.

VENDOR AND PURCHASER.

By conditions of sale it was stipulated that the vendor of an estate which was sold in lots should deliver an abstract of the title to the purchasers, and deduce a good title, but that as to a part of the estate, acquired under an inclosure, he should not be bound to shew any title thereto prior to the award; and it was farther stipulated that the vendor should deliver up to the largest purchaser in value all the title deeds and other documents in his custody, but should not be required to produce any original deed or other documents than those in his possession and set forth in the abstract: Held, on the construction of these conditions, that they did not relieve the vendor from his liability to verify the title shewn upon the abstract by producing the title deeds themselves, or, if any of them were not in his possession, by other satisfactory evidence.

If a vendor intends to deprive a purchaser of the right to the production of any evidence necessary to verify the title beyond what the

the title deeds in his own custody will supply, he is bound to make that intention previously known to the purchaser in clear and explicit terms. *Southby v. Hutt.*

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VERIFICATION OF ABSTRACT.

See VENDOR AND PURCHASER.

VISITOR.

See CHARITY, 1.
COLLEGE.

WARD OF COURT.

The Court will not make an order, permitting the removal of its infant wards out of the jurisdiction, for the purpose of residing permanently abroad, except in a case of imperative necessity; as, where it is clearly proved that a constant residence in a warmer climate is absolutely essential to their health.

Such an order, if made, ought to comprise a scheme for the education of the infants, as well as a provision for informing the Court from time to time of their progress and condition, and an undertaking to bring them within the jurisdiction when required. *Campbell v. Mackay.*

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WILL.

1. A testator by his will gave 3000*l.* to his brother *B.* for life, with re-

mainder, as to 1000*l.*, to his wife for life; remainder, as to the whole, to his children; he then gave 6000*l.* to his sister *S.* for life, with remainder to her husband for life, remainder to her children; and, after bequeathing 10*l.* a year to each of his two maid servants for their lives, he gave all his real estate, and the residue of his personal estate, to his sister *H.* absolutely. By a testamentary paper, described as a codicil to his will, he left his brother *B.* an equal share of his effects with his sisters, to have the interest for his life, with remainder to his children, subject to a life interest in 1000*l.* to his wife, if living at his death; and his sister *S.* was to have an equal share with his sister *H.* By a subsequent testamentary paper, also described as a codicil, he left his two maid servants 10*l.* a year each for their lives, and nominated a person to act as trustee with the executors named in the will:

Held, upon the effect of all the testamentary papers taken together, that the will, though modified, was not wholly revoked by the first codicil; and that, in lieu of the 6000*l.* legacy given them by the will, *S.* and her children were entitled to one third share of the personal estate, in the same manner and subject to the same limitations as had been expressed by the will with respect to that legacy. *Cookson v. Hancock.*

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sarily depend upon a title to the ship claimed under such contract.
Davenport v. Whitmore. Page 177

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If a vendor intends to deprive a purchaser of the right to the production of any evidence necessary to verify the title beyond what the

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Held, upon the effect of all the testamentary papers taken together, that the will, though modified, was not wholly revoked by the first codicil; and that, in lieu of the 6000*l.* legacy given them by the will, *S.* and her children were entitled to one third share of the personal estate, in the same manner and subject to the same limitations as had been expressed by the will with respect to that legacy. *Cookson v. Hancock.*

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2. A testatrix by her will bequeathed all her personal estate to C., whom she appointed one of her executors, for his own use and benefit for ever, trusting and wholly confiding in his honour, that he would act in strict conformity with her wishes. Afterwards, on the same day, she executed a testamentary paper, which contained a list of a number of persons by name, and, among others, the name of the person who was her sole next of kin, with the several sums to be given to them respectively, and concluded with a declaration that such was the testatrix's wish:

Held, upon appeal, that C. took the personal estate for his own use absolutely, subject only to the payment of the legacies specified in the testamentary paper, and of three other sums, which C. by his answer admitted that the testatrix had directed him, and which he submitted to pay. *Wood v. Cox.*

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3. A testator, after bequeathing a number of pecuniary legacies, to different persons, and giving a certain field to his godson, directed that all his debts and the above legacies, should be paid and discharged within six months after his decease; and all the rest and residue of his estate, both real and personal, he gave to N. The personal estate proving insufficient to pay the debts and legacies, it was held, upon demurrer to a bill by some of the legatees seeking to charge their legacies on the real estate which passed under the residuary devise to N.,

First, that there was no equity in favour of pecuniary legatees, to have the assets marshalled, so as to throw the debts upon the real estate devised to N.; but,

Secondly, that both the debts and legacies were, by the words of the will, effectually charged upon that estate. *Mirehouse v. Scaife.*

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END OF THE SECOND VOLUME.

LONDON:

Printed by A. SPOTTISWOODS,
New-Street-Square.

APPENDIX.

*ORDERS for better regulating the Hearing of Causes
and other Matters in the Court of Chancery.*

COURT OF CHANCERY.

5th May, 1837.

The Right Honourable CHARLES CHRISTOPHER Lord COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY Lord LANGDALE, Master of the Rolls, and the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, doth hereby order and direct in manner following; that is to say,—

I. THAT, from and after the 20th day of May now instant, every original information or bill of complaint filed in the High Court of Chancery, shall (at the option of the party, informant or complainant, by or on whose behalf the information or bill shall be filed) be distinctly marked at or near the top or upper part thereof, either with the words “Lord Chancellor,” or with the words “Master of the Rolls:” And that the Six Clerk and Clerk in Court, to whom the filing of the information or bill belongs, shall, in the books and indexes in which the same shall be entered, add to the entry thereof such distinguishing words or mark as may make it appear from such entry whether the information or bill is marked with the words “Lord Chancellor,” or with the words “Master of the Rolls:” and that, from and after the said 20th day of May, the Six Clerks and Clerks in Court are not to file any original information or bill of complaint which shall not be marked in the manner hereinbefore directed.

II. THAT, in every cause in which the original information or bill shall be marked with the words “Lord Chancellor,” or with the words “Master of the Rolls,” the Six Clerk to whom it belongs to give or sign the certificate that the cause is ready for hearing shall, upon

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being applied to for such certificate, see that the same certificate is marked, or cause the same to be marked, with the words "Lord Chancellor," or with the words "Master of the Rolls," in conformity with the like words marked on the original information or bill.

III. THAT, in every cause now in Court, but which has not yet been set down for hearing, the Clerk in Court who, on the behalf of the informant, or of the plaintiff or defendant, shall, at any time after the 20th day of May instant, apply to the Six Clerk to set down the cause for hearing, or for the certificate that the cause is ready for hearing, shall state or certify to such Six Clerk whether any orders or order disposing of any pleas or plea, demurrers or demurrer, or any special orders or order upon merits shewn by answer or by affidavit, have or has been made in the cause, or (in case no such order as aforesaid has been made) whether the party on whose behalf the application is made desires the cause to be heard before the Lord Chancellor or the Master of the Rolls; and in case the Clerk in Court so applying shall certify that any such order as aforesaid has been made by the Lord Chancellor or Vice-Chancellor, and not by the Master of the Rolls, or that such orders as aforesaid have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but that the last of such orders has been made by the Lord Chancellor or Vice-Chancellor, or (in case no such order has been made in the cause) that the party desires the cause to be heard before the Lord Chancellor, the Six Clerk giving the certificate shall see that the same certificate is marked, or shall cause the same to be marked, with the words "Lord Chancellor;" and the Six Clerk and Clerk in Court shall cause the entries of the cause in their books and indexes to be marked with such distinguishing words or marks as shall signify that the cause is to be heard before the Lord Chancellor; and in case the Clerk in Court so applying as aforesaid shall certify that any such order as aforesaid has been made by the Master of the Rolls, and not by the Lord Chancellor or Vice-Chancellor, or that such orders as aforesaid have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but that the last of such orders has been made by the Master of the Rolls, or (in case no such order as aforesaid has been made in the cause) that the party

desires the cause to be heard before the Master of the Rolls, the Six Clerk giving the certificate shall see that the same certificate is marked, or shall cause the same to be marked, with the words "Master of the Rolls;" and the Six Clerk and Clerk in Court shall cause the entries of the cause in their books and indexes to be marked with such distinguishing words or marks as shall signify that the cause is to be heard before the Master of the Rolls.

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IV. THAT the Registrars of the Court, and the Secretaries of the Lord Chancellor and of the Master of the Rolls, are not at any time after the said 20th day of May instant, to set down to be heard any cause in which the certificate of the cause being ready for hearing shall not be marked in the manner directed by the 2d and 3rd Orders, and are not, after the date of these Orders, to set down to be heard before the Master of the Rolls any cause, further directions, or exceptions, which is or are now set down to be heard before the Lord Chancellor, and are not, without special order of the Lord Chancellor, to set down to be heard before the Lord Chancellor any cause, further directions, or exceptions, which is or are now set down to be heard before the Master of the Rolls.

V. THAT in every petition praying that a day may be appointed for arguing a plea or demurrer put in to any information or bill filed on or after the said 20th day of May, it shall be stated whether the information or bill to which such plea or demurrer is put in is marked with the words "Lord Chancellor," or with the words "Master of the Rolls."

VI. THAT, from and after the said 20th day of May instant, the several causes and matters hereinafter mentioned, not already set down, shall be set down to be heard before the Lord Chancellor, and shall not without special order of the Lord Chancellor be set down to be heard before the Master of the Rolls.

1. Every plea or demurrer, and all exceptions in any cause in which the information or bill shall be marked with the words "Lord Chancellor," or in which the entries of the cause in the Six Clerks' books shall be so marked as to signify that the same is to be heard before the Lord Chancellor.

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2. Every cause in which the certificate of the cause being ready for hearing shall be marked with the words "Lord Chancellor."

3. Every cause requiring to be heard for further directions, or on the equity reserved, and in which the Master's report has been or shall be made, or a trial at law has been or shall be had, or the certificate of a court of common law has been or shall be obtained in pursuance of a decree or order pronounced by the Lord Chancellor or Vice-Chancellor.

4. Every exception or set of exceptions taken to any report made by a Master in ordinary, in pursuance of a decree, or an order of reference (not being an order obtained as of course), made by the Lord Chancellor or the Vice-Chancellor.

VII. THAT, from and after the said 20th day of May instant, every petition presented or motion made under or pursuant to the liberty to apply contained in any decree or decretal order of the Lord Chancellor or Vice-Chancellor, shall, as to petitions, be addressed to and set down to be heard before the Lord Chancellor, and shall, as to motions, be made before the Lord Chancellor or Vice-Chancellor; and that no such petition or motion shall, without special order of the Lord Chancellor, be addressed to or made before the Master of the Rolls.

VIII. THAT all such pleas, demurrers, causes, further directions, exceptions, and petitions, to be so set down to be heard before the Lord Chancellor, as hereinbefore is directed, shall be heard and determined in the same manner, and be subject to the same rules, as pleas, demurrers, causes, further directions, exceptions, and petitions set down before the Lord Chancellor, have heretofore been heard and determined.

IX. THAT, from and after the said 20th day of May instant, all interlocutory applications by way of motion or petition (other than applications for orders of course), shall, in the several cases hereinafter mentioned, be made to the Lord Chancellor or to the Vice-Chancellor, and shall not, without special order of the Lord Chancellor, be made to the Master of the Rolls; viz. in the several cases following:—

1. Where the original information or bill is marked with the words "Lord Chancellor."

ORDERS IN CHANCERY.

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2. Where the cause has not been set down for hearing, and any order disposing of any plea or demurrer or any special order upon merits, shewn by answer or by affidavit, has been made in the cause by the Lord Chancellor or Vice-Chancellor, and no such order has been made by the Master of the Rolls.

3. Where the cause has not been set down for hearing, and orders disposing of pleas or demurrers, or special orders upon merits shewn by answer or affidavit, have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but the last of such orders was made by the Lord Chancellor or Vice-Chancellor.

4. Where the cause has been set down for hearing before the Lord Chancellor, either for original hearing or for further directions, or on the equity reserved.

5. Where the decree or last decretal order was made by the Lord Chancellor or Vice-Chancellor, except in cases where the decree or last decretal order was made by the Lord Chancellor on a re-hearing of a decree or decretal order made by the Master of the Rolls.

X. THAT, from and after the said 20th day of May instant, the several causes and matters hereinafter mentioned, not already set down, shall be set down to be heard before the Master of the Rolls, and shall not, otherwise than for the purpose of re-hearing, be set down to be heard before the Lord Chancellor.

1. Every plea or demurrer, and all exceptions in any cause in which the information or bill shall be marked with the words "Master of the Rolls;" or in which the entries of the cause in the Six Clerks' books shall be so marked as to signify that the same is to be heard before the Master of the Rolls.

2. Every cause in which the certificate of the same being ready for hearing shall be marked with the words "Master of the Rolls."

3. Every cause requiring to be heard for further directions or on the equity reserved, and in which the Master's report has been or shall be made, or a trial at law has been or shall be had, or the certificate of a Court of Common Law has been or shall be obtained, in pursuance of a decree or order pronounced by the Master of the Rolls.

4. Every exception, or set of exceptions, taken to any report made by a Master in ordinary, pursuant to a de-

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cree or an order of reference (not being an order obtained as of course) made by the Master of the Rolls.

XI. THAT, from and after the said 20th day of May instant, every petition presented, or motion made, under or pursuant to the liberty to apply contained in any decree or decretal order of the Master of the Rolls, shall be addressed to and set down to be heard, or shall be made, before the Master of the Rolls: and that, except for the purpose of re-hearing an order of the Master of the Rolls, no such petition or motion shall be addressed to or made before the Lord Chancellor.

XII. THAT, from and after the said 20th day of May instant, all interlocutory applications, by way of motion or petition (other than applications for orders of course), shall, in the several cases hereinafter mentioned, be made to the Master of the Rolls, and shall not, except for the purpose of re-hearing an order of the Master of the Rolls, be made to the Lord Chancellor; viz. in the several cases following:—

1. Where the original information or bill is marked with the words “Master of the Rolls.”

2. Where the cause has not been set down for hearing, and any order disposing of any plea or demurrer, or any special order upon merits shewn by answer or affidavit, has been made in the cause by the Master of the Rolls, and no such order has been made by the Lord Chancellor or Vice-Chancellor.

3. Where the cause has not been set down for hearing, and orders disposing of pleas or demurrers, or special order upon merits shewn by answer or affidavit, have been made by both the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but the last of such orders has been made by the Master of the Rolls.

4. Where the cause has been set down for hearing before the Master of the Rolls, either for original hearing or for further directions, or on the equity reserved, and is not now set down to be so heard before the Lord Chancellor.

5. Where the decree or last decretal order was made by the Master of the Rolls or by the Lord Chancellor, on the re-hearing of a decree or decretal order of the Master of the Rolls.

ORDERS IN CHANCERY.

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XIII. THAT the above Orders as to interlocutory applications shall not extend to any applications for orders of course, nor to any petitions presented, or notices of motion given, before the 18th day of May instant.

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XIV. THAT all applications for orders of course to be obtained on petition or motion shall and may be made in the same manner in all respects as if the above Orders had not been made; but as to all cases in which, according to the 9th preceding Order, interlocutory applications (other than applications for orders of course) are directed to be made before the Lord Chancellor or Vice-Chancellor, if any order nisi, upon which cause against making the order absolute is to be shewn to the Court, shall be obtained as of course from the Master of the Rolls, such cause shall be shewn before the Lord Chancellor or Vice-Chancellor; and if any order of reference to the Master in ordinary shall be obtained as of course from the Master of the Rolls, and the Master's report pursuant to such order of reference shall be excepted to, the exceptions thereto shall be heard before the Lord Chancellor or the Vice-Chancellor: and in all cases in which, according to the 12th preceding Order, interlocutory applications (other than applications for orders of course) are directed to be made before the Master of the Rolls, if any order nisi, upon which cause against making the order absolute is to be shewn to the Court, shall be obtained as of course from the Lord Chancellor or Vice-Chancellor, such cause shall be shewn before the Master of the Rolls; and if any order of reference to the Master in ordinary shall be obtained as of course from the Lord Chancellor or Vice-Chancellor, and the Master's report pursuant to such order of reference shall be excepted to, the exceptions thereto shall be heard before the Master of the Rolls.

XV. THAT, in the interval between the close of the sittings after any term and the commencement of the sittings before or at the beginning of the next ensuing term, applications for special orders may be made to any Judge of the Court in the same manner as if these Orders had not been made; but that the orders which shall be made in any such interval by the Lord Chancellor, or by the Master of the Rolls, or by the Vice-

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Chancellor, shall, if not made by the Judge to whom the application, if made during the ordinary sittings of the Court, would have been made pursuant to the directions contained in these Orders, be marked as having been made for such Judge, and shall in the future proceedings of the cause be deemed to be the order of such Judge in all respects save this, — that no order so made by one Judge for another under the circumstances aforesaid shall be re-heard for the purpose of being discharged or varied otherwise than by the Lord Chancellor.

XVI. THAT, from and after the said 20th day of May instant, all matters which, under and by virtue of any Act of Parliament or otherwise, the Court hath jurisdiction to hear and determine in a summary way, and which shall be in the first instance brought under the consideration of the Court upon a petition presented to the Lord Chancellor, shall in any subsequent stage of the proceedings respecting the same matters be heard and determined by the Lord Chancellor or Vice-Chancellor; and that no petition respecting the same matters in any subsequent stage of the proceedings relating thereto, shall, without special order of the Lord Chancellor, be set down to be heard before the Master of the Rolls; and that all such matters as aforesaid which shall be in the first instance brought under the consideration of the Court upon a petition to the Master of the Rolls, shall, in any subsequent stage of the proceedings respecting the same matters, be heard and determined by the Master of the Rolls; and that no petition respecting the same matters in any subsequent stage of the proceedings relating thereto, shall, otherwise than for the purpose of re-hearing an order of the Master of the Rolls, be set down to be heard before the Lord Chancellor.

COTTENHAM, C.
LANGDALE, M. R.
LANCELOT SHADWELL, V. C.



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